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United States Official Court Reporter

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION**

UNITED STATES OF AMERICA,)
)
Plaintiff,) CR-16-09-GF-BMM
)
versus)
)
CHERYL LYNN LITTLE DOG,)
)
Defendant.)

PARTIAL TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

**TESTIMONY OF SPECIAL AGENT MARK ZAHACZEWSKY
TESTIMONY OF DEPUTY UNITED STATES MARSHAL LOGAN BRYCE**

**BEFORE THE HONORABLE BRIAN M. MORRIS
UNITED STATES DISTRICT COURT JUDGE
FOR THE DISTRICT OF MONTANA**

Charles N. Pray Courtroom
Missouri River Federal Courthouse
United States District Court Great Falls
125 Central Avenue West
Great Falls, MT 59404

**April 28, 2016
1:30 p.m.**

Proceedings recorded by machine shorthand
Transcript produced by computer-assisted transcription

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DEPUTY UNITED STATES MARSHAL WILLIAM LOGAN BRYCE:

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EXHIBITS**EXHIBIT:****DESCRIPTION:****ADMITTED:**

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PROCEEDINGS

(Open court)

(Defendant present)

(The partial proceedings

began at 1:35 p.m.)

THE BAILIFF: The United States District Court is
back in session.

THE COURT: Please be seated. Madam clerk, please
call the next case on the Court's calendar.

CLERK OF COURT: This Court will now conduct a
motion hearing in Cause Number CR-16-9-GF-BMM, United States
of America versus Cheryl Lynn Little Dog.

THE COURT: Good afternoon, Mr. Dake.

MR. DAKE: Good afternoon, Your Honor.

THE COURT: Good afternoon, Mr. Rostad.

MR. ROSTAD: Your Honor.

THE COURT: Mr. Rostad, I understand you will just
be eye-candy for this proceeding.

MR. ROSTAD: I am, Your Honor. You know, I would
rather have the youth, you know, get the experience.

THE COURT: I understand.

All right. Good afternoon, Ms. Cross Guns.

MS. CROSS GUNS: Good afternoon, Your Honor.

THE COURT: Good afternoon, Ms. Little Dog.

THE DEFENDANT: Good afternoon.

1 THE COURT: We are here on a motion filed by Ms.
2 Little Dog to suppress evidence seized during -- or
3 discovered during the warrantless search of her house. Mr.
4 Rostad, the government has filed a response to that motion,
5 and I think the burden is on the government to prove the
6 legality of the search.

7 Mr. Dake, I guess. I should be directing to you.

8 MR. DAKE: It is, yes, Your Honor.

9 THE COURT: Okay. Do you want to call your first
10 witness?

11 MR. DAKE: Thank you. The United States calls
12 Special Agent Mark Zahaczewsky from the FBI.

13 CLERK OF COURT: Please raise your right hand.
14 (The witness was duly sworn.)

15 THE WITNESS: I do.

16 CLERK OF COURT: Thank you.

17 THE COURT: Good afternoon, Mr. Zahaczewsky.

18 THE WITNESS: Afternoon, Judge.

19 THE COURT: I know how to spell it, but for the
20 benefit of the court reporter I would ask you to say your
21 first name and last name, and spell your last name.

22 THE WITNESS: Yes. It's Mark Zahaczewsky, and it's
23 spelled Z-A-H-A-C-Z-E-W-S-K-Y.

24 THE COURT: Go ahead, Mr. Dake.

25 MR. DAKE: Thank you very much, Your Honor.

DIRECT EXAMINATION

1
2 BY MR. DAKE:

3 Q. Special Agent, can you please introduce yourself and say
4 what your current position is?

5 A. Yes. I am Special Agent Mark Zahaczewsky. I am currently
6 an agent -- a special agent with the FBI assigned to the
7 Shelby resident agency in Shelby, Montana.

8 Q. How long have you been in that position, sir?

9 A. Three-and-a-half years in Shelby.

10 Q. And for the Court's reference, can you provide a
11 background of your training that you received for this
12 position?

13 A. (Pause) The -- the FBI Academy, I believe, is six months
14 long. This is my first assignment.

15 Q. In that FBI training, did you also receive training about
16 how to conduct valid searches?

17 A. Yes.

18 Q. Okay. Can you just briefly describe that for the Court,
19 about what that entailed?

20 A. It includes primarily establishing probable cause for a
21 search and/or getting a warrant and/or consent.

22 Q. Thank you very much. Special Agent, did you become
23 involved in a search for an individual by the name of Frank
24 Gallardo?

25 A. I did.

1 Q. Can you first explain to the Court how you became aware of
2 a Mr. Frank Gallardo being in the Browning, Montana, area?

3 A. Yes. I received a telephone tip from an anonymous caller
4 who said that she -- he or she had been present or had
5 recently been at a sweat, which is a Blackfeet traditional
6 ceremony. This was -- had occurred the previous weekend.
7 The telephone call came in on October 15th. She said that
8 during the course of the ceremony, she identified this
9 individual, and was at one point engaged in a conversation
10 with him. Per her statement, she said that the responses
11 that she got from this individual made her feel
12 uncomfortable. She identified the man as a Frank Gallardo,
13 also known as Frank Thunder Hawk.

14 She noticed that the individual was there with Cheryl
15 Little Dog. Following that, she also learned that Cheryl was
16 hosting him, so he was staying at her house for that time
17 period. After leaving the ceremony, she did some Internet
18 research on him and discovered that there was an FBI warrant.
19 On the Open-Source FBI website there is warrants, this
20 individual's name was listed there. He was currently wanted
21 out of the Sioux Falls, I believe it is, region for sexual
22 assault.

23 Q. Thank you, sir. So, after you received this anonymous
24 tip, what was the follow-up that you did independently?

25 A. The first step -- we receive a lot of tips, and the first

1 step was to corroborate the tip to establish some validity.
2 It appeared to be truthful. I looked into it and identified
3 the website that she had found his identity, and it was as
4 she had stated.

5 I then reached out to Supervisor Deputy U.S. Marshal
6 Nate Johns out of Great Falls, Montana, and I asked him for
7 some assistance, preferably the next day, to go out and
8 investigate the tip. I also contacted the Glacier County
9 Sheriff's Office and talked to Deputy Mikey Connelly there.

10 I also reached out to Blackfeet Law Enforcement Services
11 Lieutenant J.R. Salois. Due to Cheryl Little Dog's status as
12 a tribal council member, I knew that there might be some flak
13 with how this was approached and I wanted to ensure that I
14 had covered all of the jurisdictions by notifying the proper
15 people. Senior Deputy Marshal Johns provided Logan Bryce and
16 said that he would be available the follow day to assist.

17 Q. What sort of internal communication did you have with
18 other agents within the FBI regarding Mr. Gallardo?

19 A. So, we work -- in the Shelby RA, we work on an on-call
20 basis. At the time, Special Agent Jared Thompson was on
21 call. I contacted him to let him know that this tip had come
22 in and that there might be some additional investigation
23 required. He then contacted the Sioux Falls area and spoke
24 to a Special Agent Robert Bennett, who was the case agent
25 listed on the FBI wanted sheet.

1 Q. What sort of information did you receive back from that
2 agent in South Dakota regarding Mr. Gallardo?

3 A. He advised -- he provided the warrant and the Indictment,
4 which -- and provided some further detail about the
5 allegations of the sexual assault for which the warrant had
6 been issued. He had said that he was recently seen, as
7 recently within the past month, fleeing the area in a
8 high-speed pursuit from tribal police in that area and that
9 he had been seen with a firearm.

10 Q. And how recent was that, sir?

11 A. I believe he said the middle of September, and this is
12 October 15th.

13 MR. DAKE: Madam clerk, if you could please show
14 the witness what's been marked as Government's Exhibit 1,
15 please?

16 BY MR. DAKE:

17 Q. Special Agent, you mentioned going to a website and
18 finding a wanted poster for Mr. Gallardo, is this the poster
19 that you remember seeing?

20 A. Yes, it is.

21 Q. Can you describe for the Court about what sort of
22 information this provides?

23 A. General descriptive information regarding the individual,
24 a photograph, and as well as additional names, which the tip
25 had provided, as well as a caution statement regarding any --

1 how he should be approached or how he should be considered.

2 Q. Thank you, sir. And I'll direct your attention just to
3 the very top here. I'm going to underline the portion --

4 MR. DAKE: Oh. Sorry, madam clerk. Thank you.

5 BY MR. DAKE:

6 Q. Underline the portion right there. Do you pay attention
7 to that portion of it, as well, sir?

8 A. Yes.

9 Q. Okay. And that is also included in the caution section,
10 as well, correct?

11 A. Correct.

12 MR. DAKE: And, madam clerk, if we could scroll
13 down, please? Thank you very much.

14 BY MR. DAKE:

15 Q. And the information stated down here at the bottom, what
16 is this referring to?

17 A. "Should be considered armed and dangerous," which, when
18 coupled with the statement provided by the special agent,
19 that he had recently been seen -- most recently been seen
20 with a firearm, we pay particular attention to that.

21 Q. Thank you very much, sir. And this document was obtained
22 off of the FBI's website, correct?

23 A. Correct.

24 MR. DAKE: And, Your Honor, regardless of the
25 applicability of the Rules of Evidence, we would move to

1 admit Government's Exhibit 1.

2 THE COURT: Ms. Cross Guns?

3 MS. CROSS GUNS: Uhm, you know, I -- I really have
4 no objection to it.

5 THE COURT: All right. Well, Mr. Dake, regardless
6 of your views on the applicability of the Rules of Evidence,
7 I'm going to admit Exhibit 1.

8 (Exhibit Number 1 was admitted.)

9 MR. DAKE: Thank you, Your Honor. And I would say
10 that it would be a self-authenticating document, Your
11 Honor.

12 BY MR. DAKE:

13 Q. Mr. Zahaczewsky, can you take us through, then, the search
14 that was conducted on October 16th, 2015?

15 A. Yes. In the initial contact with the local law
16 enforcement, Deputy Connelly and Lieutenant Salois had been
17 asked to conduct a surveillance of the residence in an
18 attempt to identify any distinguishing characteristics or a
19 possibility that he might be -- of him being at the
20 residence. We did that to identify the house, first off, and
21 then to be able to brief it the following day when the
22 remainder of the agents showed up in order to go and make
23 contact.

24 It was early in the afternoon, I forget exactly which
25 time we met at the federal building, and it included myself,

1 Deputy U.S. Marshal Bryce, two BIA Special Agents, John
2 Grinsell and Kyle Sinclair. Blackfeet Law Enforcement
3 attended, as well; Glacier County Deputy Mikey Connelly, and
4 Blackfeet Law Enforcement drug agent, Felix Costillo.

5 Q. Special Agent, I'm going to stop you just for a moment.
6 Can you just explain to the Court just the total number of
7 officers that were involved in the search?

8 THE COURT: Why don't we break it down by their
9 agency and who they were.

10 MR. DAKE: Thank you, Your Honor.

11 BY MR. DAKE:

12 Q. If we can start first, how many FBI individuals were
13 involved?

14 A. One.

15 Q. How many individuals from the United States Marshals?

16 THE COURT: Hold on. You were the FBI agent?

17 THE WITNESS: Yes, sir.

18 THE COURT: Okay.

19 THE WITNESS: One.

20 BY MR. DAKE:

21 Q. And that was Deputy Logan Bryce?

22 A. That's correct.

23 Q. And then from Glacier County, how many?

24 A. Mikey Connelly, one.

25 Q. And then from Blackfeet Law Enforcement?

1 A. Felix Costillo.

2 Q. And then from the BIA?

3 A. John Grinsell and Kyle Sinclair.

4 Q. So a total of six individuals, correct, sir?

5 A. Yes. At the initial briefing, Blackfeet Law Enforcement
6 also attended, J.R. Salois, because he had participated in
7 the previous surveillance, and then Misty Salois.

8 Q. How many, then, went to Ms. Little Dog's residence on
9 October 16th?

10 A. There was two per vehicle, so that would be four
11 vehicles.

12 Q. So, a total of eight officers went to her residence?

13 A. To the area, correct.

14 Q. The area. And can you describe for the Court --

15 THE COURT: Wait a minute, Mr. Dake. We had six
16 officers identified as going to the meeting, who are the
17 eight that made the trip?

18 BY MR. DAKE:

19 Q. The two additional officers, sir, were Salois and -- I'm
20 sorry, the other officer?

21 A. Also a Salois. J.R. and Misty Salois.

22 Q. So, both --

23 A. Same last name.

24 Q. And both of those were involved in the initial
25 surveillance of the home?

1 A. J.R. Salois and Mikey Connelly conducted the initial
2 surveillance the previous day.

3 Q. Thank you very much. And, so, after you had the initial
4 briefing, how many went to Ms. Little Dog's residence?

5 A. Both Saloises, I believe, were in the same vehicle. Mikey
6 Connelly and Felix Costillo were in an unmarked vehicle.
7 Uhm, the BIA agents were together and also in an unmarked
8 vehicle. Deputy Bryce and I initially went to the workplace
9 of Cheryl Little Dog, the other three vehicles went out to
10 East Glacier.

11 Q. Can you describe for the Court just in general about where
12 Ms. Little Dog's house is located?

13 A. Sure. It's in a suburban neighborhood in the East Glacier
14 area.

15 Q. Are there other houses surrounding it, or is it all by
16 itself?

17 A. There are other houses surrounding it.

18 Q. Is it on a cul-de-sac street or just a single through
19 street? What is it on?

20 A. It's in the middle of a through street.

21 Q. And how many houses, approximately, surround that?

22 A. I couldn't -- I couldn't estimate.

23 Q. One on each side, though, sir?

24 A. Easily, yes.

25 Q. And then across the street are there houses?

1 A. There are houses across the street, and there are houses
2 on the back side of the residence.

3 Q. Thank you, sir. Now, Special Agent, you then pull up to
4 the house, what officers pull up in front of Ms. Little Dog's
5 residence?

6 A. Prior to going out there, we had given explicit
7 instructions to Blackfeet Law Enforcement to avoid the area.
8 That they would be ready, if necessary, but we didn't want
9 them to make contact due to previous interactions with Ms.
10 Little Dog and because of her status as a tribal council
11 member. They were in the area behind the residence.

12 Immediately behind the residence, BIA took up position
13 to observe the rear of the building. The front of the
14 residence was observed by Mikey Connelly and Felix Costillo
15 in an unmarked vehicle, and it was approximately one or two
16 houses down across the street.

17 Q. And how many individuals were in your car, sir?

18 A. I was riding with Deputy Bryce.

19 Q. So, you and Deputy Bryce pulled up to the front portion of
20 the house, correct?

21 A. We pulled up to Deputy Connelly several houses down.

22 Q. Okay. And, so, how --

23 THE COURT: Mr. Dake, let me interrupt your
24 narrative. There was discussion earlier that didn't go
25 anywhere that Marshal Bryce went to Ms. Little Dog's place of

1 work?

2 MR. DAKE: That -- I'm sorry, Your Honor?

3 THE COURT: I thought Mr. Zahaczewsky testified --

4 THE WITNESS: Yes, Your Honor.

5 THE COURT: -- that at some point on the way to Ms.

6 Little Dog's house that Mr. Bryce went to Ms. Little Dog's

7 place of work.

8 BY MR. DAKE:

9 Q. Can you explain that, Special Agent, please?

10 A. Yes. The initial plan was to send the initial vehicles
11 out to conduct surveillance on the house, to watch the house
12 while Deputy Bryce and I went to her place of work. We hoped
13 to encounter her there and make contact at that point. We
14 sat at her workplace, and identified no vehicle belonging to
15 Ms. Little Dog as being at her workplace.

16 We called Deputy Connelly, who, at that point, had
17 established a position in the front of the house and
18 identified several vehicles being at the residence at that
19 time. Being that her vehicle was not at work and most likely
20 at the residence, we left the workplace and headed to East
21 Glacier.

22 Q. Thank you, sir. And, so, Special Agent, you came to the
23 house, you pulled up to the house, where did you park your
24 vehicle?

25 A. Well, we initially pulled up in a driveway several houses

1 down where I spoke with Mikey Connelly to see what he had
2 seen in the time it took for us to get there. He said no one
3 had come or gone in that time. As we were speaking, the
4 front door opened and someone came out. Deputy Bryce and I
5 determined at that time that we would go to the residence.

6 We backed out and moved, I believe it was two houses
7 down, and pulled into the driveway of the residence.

8 Q. So, you pulled into the driveway of Ms. Little Dog's
9 residence, correct?

10 A. That's correct.

11 Q. Did any other police vehicles pull in front of her
12 residence at that time?

13 A. Deputy Connelly pulled up behind us, and I believe he
14 parked on the street.

15 Q. And was he in a marked or an unmarked car?

16 A. Unmarked vehicle.

17 Q. Were there any other officers or vehicles present at that
18 time, sir?

19 A. No, sir.

20 Q. Can you take the Court through, then, what happened once
21 you exited your vehicle?

22 A. I got out of the vehicle, and the first thing that I
23 noticed was a small boy walking out the front door towards
24 us. I encountered him, said, "Hello, how are you? Do you
25 live here?" He said, "This is my grandmother's house." I

1 asked, "Who is your grandmother?" He said, "Cheryl." I
2 said, "Is Cheryl there?" He said, "Yes, Cheryl is home." I
3 said, "Is anybody else with her?" He said, "Yes, her
4 boyfriend."

5 Q. What happened after that, then, sir?

6 A. When he said that, I heard the front door lock. Uhm, and
7 I directed my attention to the front door, and I pointed to
8 it to alert the other officers behind me that motion was at
9 the door. At that time, Deputy Bryce was behind me and had
10 shown the boy a photograph, and he identified him as Frank
11 Gallardo.

12 Q. How many officers were outside of the house on foot at
13 this point?

14 A. At that point, I believe just three.

15 Q. And, so, what did you do after this, then, sir?

16 A. I went to the front of the residence and I knocked
17 announcing myself and -- my identification and the authority
18 reps who were there. I knocked approximately three times
19 asking Cheryl to come to the door. I got no response.

20 Q. How long did you wait in between each of those knocks,
21 sir, approximately?

22 A. I couldn't estimate. It was a lengthy period of time. We
23 were all -- we all knew Cheryl's situation, being that she
24 was in a wheelchair and it might take a little bit longer to
25 get to the door. So, we knocked and gave her appropriate

1 time.

2 Q. So, you knocked a total of three times announcing each
3 time who you were?

4 A. That is correct.

5 Q. Okay. And what happened after that?

6 A. I believe it was three times. And after the third time
7 that I knocked, Deputy Bryce knocked. He announced the same
8 thing, and at that point he said, Cheryl, come to the door, I
9 don't want to kick it in or I'm going to kick it in.

10 Q. Something about kicking the door in?

11 A. Something about kicking it in, correct.

12 Q. And, so, what happened after that?

13 A. I heard, "Hold on."

14 Q. From inside of the house?

15 A. From inside of the house. I heard, "Hold on," and, again,
16 we provided adequate time for her to open the door. The door
17 opened at that time. Deputy Bryce initially made contact
18 with her. And she said, "Hold on," and she backed away from
19 the door to allow the door (sic) to enter. Inside the front
20 of the residence is a threshold --

21 Q. Special Agent, if I could just stop you for a moment. If
22 you could just describe for the Court, is this a single door
23 or are there two doors? What do the doors look like?

24 A. It's a single door.

25 Q. Is there a screen door, as well, sir?

1 A. There is a screen door.

2 Q. So, you had -- had you opened the screen door in order to
3 knock?

4 A. I had opened the screen door, and it was behind me. I was
5 holding it open as I knocked.

6 Q. And, then, when Ms. Little Dog opened the door for you,
7 you said she opened the door partway?

8 A. Correct.

9 Q. And then what happened after that, sir?

10 A. That was to allow her -- she asked for time to back away
11 from the door so that the door could open completely. At
12 that time, Deputy Bryce introduced himself, he said, "Hi,
13 Cheryl." Deputy Bryce had dealt with Cheryl in the past and,
14 apparently, they know each other. So, he made contact with
15 her, and he said, "We are looking for Frank." I believe she
16 said, He is not here. She --

17 MS. CROSS GUNS: Your Honor, --

18 THE COURT: Hold on.

19 MS. CROSS GUNS: Just if I may object to him
20 testifying as to what Mr. Bryce said. Mr. Bryce is going to
21 testify.

22 THE COURT: Yeah. Okay. Well, let's get to that.
23 I mean, he can testify as to what he heard, but let's move on
24 here quickly with what Mr. Zahaczewsky was doing. Mr. Bryce
25 can speak for himself.

1 MR. DAKE: Thank you, Your Honor.

2 BY MR. DAKE:

3 Q. And, so, Special Agent, can you just describe what
4 happened when you entered the residence, then? How did that
5 occur?

6 A. Yes. I heard Deputy Bryce speaking with Cheryl; and as
7 they made their way into the residence, I followed.

8 Q. And where were they going in the residence? Where did you
9 observe them going?

10 A. Into the living room.

11 Q. How far away, approximately, sir, was the front door area
12 to the living room?

13 A. It would be me to the front of that desk (indicating).

14 Q. So, approximately, seven feet?

15 A. Approximately.

16 Q. From the front door area where you were standing to where
17 they moved to, correct?

18 A. Correct. And, then, from that point, it opens up into the
19 main living room.

20 Q. At any point during this time did Ms. Little Dog tell you
21 that you could not enter the residence?

22 A. No, she did not.

23 Q. Tell us what happened, then, after you had entered the
24 residence and what you were doing.

25 A. I moved to a position that I could observe the hallway.

1 Uhm, Cheryl was being cooperative, and I waited for consent,
2 and Deputy Connelly to move with me, to conduct a search of
3 the residence.

4 Q. What happened after that, then, sir?

5 A. Deputy Bryce remained in the living room with Cheryl.
6 Deputy Connelly and I searched the residence. Shortly after,
7 we were joined by Felix Costillo.

8 Q. So, how many officers total were in the residence at this
9 time?

10 A. Four.

11 Q. So, take us through what happens with the search at this
12 time, sir.

13 A. As I had moved from room to room, I announced -- or I
14 called out to Frank by name, announcing that we were law
15 enforcement and asked him to comply and come out. There was
16 no response. And then we searched the residence for any
17 place that people could be hiding.

18 Q. Can you take the Court through the different rooms that
19 you searched?

20 A. Yes. On entry, there was a hallway to the left. Down the
21 hallway, there is a bathroom on the right, the first door.
22 There is a space where the washing machine and dryer are, and
23 then a main master bedroom on the right-hand side. On the
24 left-hand side, there is an immediate bedroom, and another
25 bedroom at the end of the hallway on the left.

1 Q. Is this a single-story residence, sir?

2 A. With a crawlspace and an attic.

3 Q. Thank you, sir. So, after you checked all of these rooms,
4 did you find Mr. Gallardo?

5 A. We did not.

6 Q. What did you do next?

7 A. I joined Deputy Bryce as he was talking to Cheryl. She
8 was cooperating and providing information about her previous
9 contacts with Frank Gallardo.

10 Q. And what did you do after that, then, sir?

11 A. The search of the house was complete and we left the
12 residence.

13 Q. Prior to leaving the residence, did you also search the
14 attic, sir?

15 A. We did.

16 Q. And can you describe that for the Court, please?

17 A. It was determined that it was an area that a person could
18 be hiding. With the assistance of Mikey Connelly and Felix
19 Costillo, I gained access to it and crawled around upstairs
20 looking. Finding no person, I left.

21 Q. Prior to leaving --

22 THE COURT: Hold on, Mr. Dake.

23 MR. DAKE: Oh, thank you.

24 THE COURT: Mr. Zahaczewsky, how did you enter the
25 attic?

1 THE WITNESS: I stood on Mikey Connelly's --

2 THE COURT: Was there a hole in the ceiling?

3 THE WITNESS: A hole in the ceiling? Yes, Your
4 Honor.

5 BY MR. DAKE:

6 Q. And that entryway to the attic, where was that located,
7 sir?

8 A. Towards the end of the hallway.

9 Q. Thank you very much. Prior to leaving the residence, you
10 had been there for approximately how long, inside of the
11 house?

12 A. Ten minutes.

13 Q. Can you describe Ms. Little Dog's overall demeanor? Was
14 she nervous? Can you provide that for the Court, please?

15 A. She was cooperative, and appeared surprised at the
16 knowledge of the warrant.

17 Q. At the knowledge of the arrest warrant, correct?

18 A. Correct.

19 Q. Okay. Thank you very much. Can you explain to the Court
20 what you did, then, after you left the residence?

21 A. We left the residence and drove approximately a block and
22 a half, two blocks to a gas station, where we reconvened and
23 discussed what we had found. We were there for approximately
24 five minutes, during which time I called -- I attempted to
25 contact Special Agent Bennett to let him know that we had

1 information provided by Cheryl that he had been -- that Frank
2 Gallardo had been in this area recently and had a new phone
3 number. I wanted to pass that information on to him.

4 It was also discussed that due to Deputy Bryce's
5 previous interactions with Cheryl, she was very cooperative
6 and he found that odd. That, coupled with the child's
7 statement that her boyfriend was there now and the
8 introduction of the idea that we might have missed a
9 crawlspace, made us want to return to the residence.

10 Q. How did this idea of a crawlspace come about?

11 A. Kyle Sinclair came up and said, "I'm familiar with this
12 area, did you guys check the crawlspace?"

13 Q. And what was your response?

14 A. "No, I must have missed it."

15 Q. What did you decide to do, then, at that point, sir?

16 A. Return to the residence.

17 Q. And who returned to the residence?

18 A. Deputy Bryce and I returned to the residence.

19 Q. Were you joined by any other officers?

20 A. Not at the residence. They drove to the area but did not
21 come into the house.

22 Q. So, this is your second approach, then, to the house,
23 correct?

24 A. That is correct.

25 Q. And where did you park this time?

1 A. In the same place, pulled into the driveway.

2 Q. Can you describe what happened when you got out --

3 THE COURT: Hold on, Mr. Dake.

4 MR. DAKE: Thank you, Your Honor.

5 THE COURT: Mr. Zahaczewsky, how much time elapsed
6 between when you left Ms. Little Dog's house and drove to the
7 gas station?

8 THE WITNESS: Approximately, five minutes.

9 THE COURT: How long were you at the gas station?

10 THE WITNESS: Approximately, five minutes.

11 THE COURT: So, you then returned back to Ms.
12 Little Dog's house, how much time between when you left Ms.
13 Little Dog's house and when you returned to her house?

14 THE WITNESS: Approximately, five minutes, Your
15 Honor.

16 THE COURT: Five, total?

17 THE WITNESS: Five to ten.

18 THE COURT: Were you set up in a spot -- you left
19 the house, went to the gas station, how long did it take you
20 to get to the gas station?

21 THE WITNESS: Oh, it's, like, a block and a half,
22 Your Honor.

23 THE COURT: Okay. So, a minute or two.

24 THE WITNESS: Correct.

25 THE COURT: You talked at the gas station for how

1 long?

2 THE WITNESS: Approximately, five minutes.

3 THE COURT: The drive is a few minutes -- one or
4 two minutes back.

5 THE WITNESS: Correct.

6 THE COURT: So, it was seven, eight minutes.

7 THE WITNESS: Correct, Your Honor.

8 THE COURT: That would be a reasonable estimate.

9 THE WITNESS: Yes, Your Honor.

10 THE COURT: Okay. Go ahead, Mr. Dake. I'm
11 sorry.

12 MR. DAKE: Thank you, Your Honor.

13 BY MR. DAKE:

14 Q. So, take us through, then, what happened when you exited
15 the vehicle, then, sir.

16 A. Deputy Bryce walked up to the door and knocked, calling
17 Cheryl by name. Cheryl responded and opened the door.

18 Q. Did Ms. Little Dog respond on the first knock this time?

19 A. (Pause) I believe she did.

20 Q. Thank you, sir. And, so, what happened after that?

21 A. Deputy Bryce -- I overheard Deputy Bryce speaking to
22 Cheryl about possibly missing something and he wanted to talk
23 with her further.

24 Q. Were you standing at the doorway with Deputy Bryce?

25 A. I was.

1 Q. And, again, did you have the screen door open?

2 A. We did.

3 Q. And was the front door fully open?

4 A. When she responded, it was very similar to the first time.

5 She said, "Hold on," and backed away so that the door could
6 open completely.

7 Q. Okay. And, then, what did Ms. Little Dog do after she had
8 opened the door fully? Where did she go at that point?

9 A. Into the living room.

10 Q. Did she tell you at any point at that time that you could
11 not come inside the residence?

12 A. She did not.

13 Q. Okay. So, what did you and Deputy Bryce do?

14 A. Deputy Bryce had mentioned -- I overheard Deputy Bryce
15 mention that there might be a crawlspace and that we were
16 interested in looking at it.

17 Q. What happened after that, then, sir?

18 A. At that time, I received a call back from Special Agent
19 Bennett, and I waited until I overheard Deputy Bryce receive
20 consent from Cheryl to go back to the bedroom where the
21 crawlspace might be located.

22 Q. And before we get to that, can you describe Ms. Little
23 Dog's demeanor at this time?

24 A. She was cooperative.

25 Q. Did she seem upset or angry that you-all were back and

1 | wanting to be in her house again?

2 | A. She denied there was a crawlspace but said go ahead and
3 | look.

4 | Q. And you were on the phone with Special Agent Bennett; is
5 | that correct, sir?

6 | A. That is correct.

7 | Q. And just for clarification, he is the agent out of South
8 | Dakota, right?

9 | A. That is correct.

10 | Q. Thank you very much, sir. So, what happened then? What
11 | did Ms. Little Dog do at this point?

12 | A. I believe I walked back to the bedroom in the lead, with
13 | Logan and Ms. Little Dog directly behind me.

14 | Q. "Logan," that's Deputy Bryce, correct, sir?

15 | A. Correct. Deputy Bryce, correct.

16 | Q. Thank you. And Ms. Little Dog was also accompanying
17 | you?

18 | A. Yes.

19 | Q. Okay. And, so, where did you go, sir?

20 | A. I walked into the bedroom. I stood at the far end of the
21 | room while I continued the conversation with Special Agent
22 | Bennett.

23 | Q. Why did you walk into this specific bedroom?

24 | A. That particular bedroom had a great deal of clothing items
25 | and clutter piled in the middle of the room. That was -- I

1 | believed that's -- I did not hear where she said it was, but
2 | that was where I believed it was most likely that the access
3 | to the crawlspace would be.

4 | Q. And what happened at that point, then, sir?

5 | A. Deputy Bryce moved the items from the floor inside the
6 | closet. The closet door was opened, many of these items had
7 | spilled into the closet.

8 | THE COURT: Hold on, Mr. Zahaczewsky. You stated
9 | that you believed this bedroom was where the -- most likely
10 | the access to the crawlspace would be?

11 | THE WITNESS: Yes, Your Honor.

12 | THE COURT: Why?

13 | THE WITNESS: Because the floor was covered with
14 | items. And it would -- with the closet opened, it would have
15 | obscured the access point to the crawlspace.

16 | THE COURT: Go ahead.

17 | BY MR. DAKE:

18 | Q. For clarification, Special Agent, did you see a crawlspace
19 | opening in any other room when you were searching earlier?

20 | A. I did not.

21 | Q. And were you able to view the floor in each of those
22 | rooms?

23 | A. (Pause) I wouldn't say completely that I could view the
24 | floor in every one of those rooms.

25 | Q. You mentioned going into this room, and Ms. Little Dog

1 accompanied you; is that correct?

2 A. Correct.

3 Q. Did she at any point say the crawlspace is not in this
4 room?

5 A. She did not.

6 Q. Thank you very much, sir. So, what happened after that?

7 A. Deputy Bryce identified an access point for a crawlspace,
8 and he alerted me to that. I ended the phone call as Deputy
9 Bryce removed the opening to the crawlspace.

10 Q. And, Special Agent, I'll stop you for a moment. Can you
11 describe for the Court just the overall size of this room and
12 where you were located?

13 A. It's a relatively-small bedroom with an open closet. The
14 access point is two, two-and-a-half feet by two-and-a-half
15 feet, at most. There were clothing items wedged in between
16 the crawlspace door and the floor. Uhm, it was primarily --
17 it appeared that there were -- there was packing going on,
18 there was clutter all over the middle of the room.

19 Q. Where were you standing, sir?

20 A. When I walked in, I walked towards the window, which would
21 have been the far side of the room, to allow Deputy Bryce and
22 Ms. Little Dog to enter.

23 Q. And where was Ms. Little Dog at this time?

24 A. She was behind me in the threshold of the door.

25 Q. So, in the doorway area.

1 A. In the doorway area, that's correct.

2 Q. And, so, you saw this access point to what looked like a
3 crawlspace, and did Ms. Little Dog provide any indication to
4 not look there or to not open that crawlspace area?

5 A. She did not.

6 Q. Okay. So, what happened after that?

7 A. Deputy Bryce removed the cover to the crawlspace and
8 pointed down directing my attention to something that he had
9 seen at the bottom. As I looked, a brassiere was at the
10 bottom of it, and it was evident of additional clothing items
11 wedged into the door, with the crawlspace hatch door.

12 Q. What happened after that, then, sir?

13 A. We announced, we called down, "Frank, law enforcement,
14 come out. Don't make us come down there." Uhm, provided an
15 opportunity for a response, there was none. Deputy Bryce
16 said, "I will go," and jumped down into the hole.

17 Q. At this time, did Ms. Little Dog say anything to law
18 enforcement? Did she say anything to you?

19 A. She said nothing.

20 Q. Okay. So, she -- did she ever say, "Stop searching," or
21 "I'm not consenting to this"?

22 A. No, I heard nothing.

23 Q. Thank you, sir. So, what happened after that, then, once
24 Deputy Bryce was in the crawlspace area?

25 A. Deputy Bryce was in the crawlspace and with a flashlight

1 | cleared the immediate area. I hovered over the hole as he
2 | did so. He called out several times to Frank. At one point,
3 | he identified a dead space area in the back of the foundation
4 | and said that he was going to go look at this.

5 | Q. And were you down in the crawlspace area at this point, or
6 | were you still up above, sir?

7 | A. I was still above.

8 | Q. And, then, when did you enter into the crawlspace?

9 | A. As Deputy Bryce moved towards the dead space area, I heard
10 | him yell, "Show me your hands! Show me your hands! Show me
11 | your hands!" At that point, I jumped into the hole and moved
12 | to his position.

13 | Q. And what did you observe when you went down into the
14 | crawlspace?

15 | A. Behind the corner of the foundation there was insulation
16 | and blanket material, and just above that I saw a man's
17 | head.

18 | THE COURT: Mr. Zahaczewsky -- let me interrupt you
19 | again, Mr. Dake.

20 | MR. DAKE: Thank you, Your Honor.

21 | THE COURT: You talked about a dead space area,
22 | what -- how is that different from the rest of the
23 | crawlspace?

24 | THE WITNESS: Your Honor, underneath the house you
25 | could see the entire open area. At one point, approximately

1 30 feet from the crawlspace, was a right-hand turn.

2 THE COURT: From the crawlspace opening?

3 THE WITNESS: Underneath the crawlspace --

4 THE COURT: You said, "30 feet from the
5 crawlspace," you mean the crawlspace opening.

6 THE WITNESS: Right. Correct. Correct, Your
7 Honor. 30 feet away from that point there is a turn in the
8 foundation that provided an area that could not be observed
9 (indicating) from directly underneath the crawlspace.

10 THE COURT: And it's the area beyond the corner
11 that you are calling a dead space.

12 THE WITNESS: Correct.

13 THE COURT: Okay. Go ahead, Mr. Dake.

14 MR. DAKE: Thank you, Your Honor.

15 BY MR. DAKE:

16 Q. What did you say to the individual in the crawlspace at
17 the time, sir?

18 A. Deputy Bryce, at that point, had yelled at him a
19 half-dozen times, "Show me your hands! Show me your hands!
20 Show me your hands!" It was a very consistent command given.
21 The individual said, "Fuck you. Shoot me. Fuck you. Shoot
22 me."

23 Q. And what happened after this, then, sir?

24 A. As I moved to position, both of us had our firearms
25 pointed at this man. Deputy Bryce said, "I'm going to tase

1 | you! I'm going to tase you, show me your hands!" Again,
2 | "Just do it, then. Fuck you. Shoot me." Deputy Bryce
3 | deployed his taser, gave him a final warning, "I'm just going
4 | to tase you! Show me your hands!" Again, same response. He
5 | fired the taser, the taser misfired. At that point, I gave
6 | the following command, "Show me your hands! Show me your
7 | hands!"

8 | At that point, he said words to the effect that I'm not
9 | going to let you cops, you tribal cops beat me again. It
10 | became evident to me that he may not quite understand who we
11 | were. I identified myself again as a federal agent and that
12 | we had a warrant for him and he would not be beaten. At that
13 | point, he complied, showed his hands slowly and was taken
14 | into custody.

15 | Q. Thank you, sir. You mentioned when you were in the
16 | crawlspace area that you had your firearm drawn, did you have
17 | your firearm drawn when you first entered Ms. Little Dog's
18 | residence?

19 | A. The -- on the first --

20 | Q. On the second search, sir.

21 | A. On the second search, no, sir.

22 | Q. And it was just you and Deputy Bryce, correct?

23 | A. That is correct.

24 | Q. And you had no firearms drawn at this point?

25 | A. That is correct.

1 Q. Going back, then, just to the first search for firearms
2 purposes, did you have your firearms drawn at the time of the
3 first search?

4 A. Yes.

5 Q. And why is that?

6 A. Because he was an armed individual and I had been given
7 reason to believe that he was there now.

8 Q. Who else had firearms drawn?

9 A. I believe we all did.

10 Q. Thank you, sir. And when you, then, came back to the
11 residence, did you still have your firearm on you at that
12 time?

13 A. Yes.

14 Q. And did Deputy Bryce have his firearm on him?

15 A. Yes.

16 Q. But neither of them were pulled out.

17 A. That's correct.

18 Q. Until you were within the crawlspace?

19 A. That's correct.

20 Q. As you were leaving the residence with Mr. Gallardo, what
21 did you do with Ms. Little Dog, then, at that point?

22 A. As I was leaving the residence?

23 Q. Yes, sir.

24 A. (Pause) I did nothing with Ms. Little Dog.

25 Q. And what --

1 A. She was detained by Blackfeet Law Enforcement at that
2 time.

3 Q. And we will go to that here in a moment, sir. And I
4 apologize, that was a tough question. When you came up from
5 the crawlspace there with Mr. Gallardo, what did you direct
6 law enforcement to do at that point?

7 A. To detain her.

8 Q. And was this a -- to arrest her, or just to detain her?

9 A. I don't recall the exact words.

10 Q. Okay. And why were you doing that at that point, sir?

11 A. So that we could con -- secure the area and determine if
12 there was any other reason or anything else to be done. But,
13 at that point, her roaming free might have been an issue.

14 Q. And, so, you took Mr. Gallardo outside of the residence.

15 A. Correct.

16 Q. What happened after that?

17 A. Mr. Gallardo was taken into custody and placed into the
18 back of Deputy Marshal -- Deputy Bryce's vehicle. Uhm, Ms.
19 Little Dog was just detained out front. I made several phone
20 calls confirming who we had to Special Agent Bennett, as well
21 as United States AUSA Danna Jackson. I called her, as well,
22 to let her know what we had, and that was what we did.

23 Q. And, then, what was the decision that you made federally
24 as far as whether you were going to arrest Ms. Little Dog at
25 that point?

1 A. We were not going to arrest her at that time.

2 Q. And what did you decide to do at that point, sir?

3 A. She was released and allowed to go back into her house.

4 Q. What happened after that, then, sir? What did you do?

5 A. At that time, due to Ms. Little Dog being cooperative for
6 the duration of those events, I thought it an opportune time
7 to interview her.

8 Q. You mentioned that Ms. Little Dog was cooperative, in
9 either the first or the second search was Ms. Little Dog --
10 did she ever tell you to not come inside of her residence or
11 that you could not search?

12 A. She did not.

13 Q. Was her overall demeanor nervous, excited? Can you
14 describe that for the Court in general between both searches?

15 A. I thought she was very cooperative and willing to share
16 information about what she -- well, willing to share
17 information, period.

18 Q. Did she seem scared at any point, sir?

19 A. No.

20 Q. Thank you. You began an interview with Ms. Little Dog,
21 correct?

22 A. Correct.

23 Q. And can you just describe for the Court, in a general
24 context, about that interview, please?

25 A. Sure. Because Ms. Little Dog had gone back into the

1 residence, uhm, I requested that Special Agent Grinsell
2 assist me in the interview. I took off my identification
3 marks and grabbed a recorder. We knocked on the door; Cheryl
4 responded. I asked her if we could talk to her for a few
5 minutes, she agreed and invited us into the living room. I
6 let her know that I would like to interview her at this time
7 and that I was going to be recording the interview.

8 Q. And what did Ms. Little Dog say?

9 A. She was willing to conduct the interview.

10 Q. And what did she tell you during this interview about her
11 previous interactions with law enforcement?

12 A. She noted that she had had issues with Blackfeet Law
13 Enforcement and Glacier County in the past.

14 Q. Did she say anything about understanding the law?

15 A. She did.

16 Q. What did she tell you about that, sir?

17 A. That she knows the law, she understands the law. At that
18 time, she was Mirandized just for the purposes of
19 acknowledging the fact that she was aware that she could ask
20 us to leave at any time. She signed the consent form. At
21 one point, she stated that she knows how we operate and what
22 we do, and that she had worked with the FBI in the past.

23 THE COURT: Mr. Zahaczewsky, who provided Miranda
24 warnings to Ms. Little Dog?

25 THE WITNESS: I did, Your Honor.

1 THE COURT: Okay. Go ahead, Mr. Dake.

2 MR. DAKE: Thank you, Your Honor.

3 BY MR. DAKE:

4 Q. You provided these Miranda warnings, what else did you
5 tell Ms. Little Dog at this point, though, from your
6 perspective?

7 A. That she was not going to be arrested, we had no plans to
8 take her away from -- at that time.

9 Q. And that was based on your discussions with other
10 individuals who were not present during that search?

11 A. That is correct.

12 Q. Thank you, sir. Did Ms. Little Dog tell you anything else
13 about her interactions or about her time with Mr. Gallardo?

14 A. She said that he had arrived the previous Friday and he
15 had left on Wednesday, uhm, and she had not seen him since.

16 Q. How did the interview end?

17 A. I'm sorry?

18 Q. How did the interview end?

19 A. She asked us to leave.

20 Q. Why?

21 A. Uhm, we were asking her about clarifying some facts. She
22 was not comfortable with the fact that we did not quite
23 believe what she was saying, and she said, "Well, I'm done
24 with this, please leave."

25 Q. And what did you do?

1 A. We left.

2 Q. Did you turn off the recorder at that time?

3 A. I did.

4 Q. Was this the first time that Ms. Little Dog told you to
5 leave her house?

6 A. Yes, it was.

7 Q. Thank you very much, sir.

8 MR. DAKE: Your Honor, we've submitted what's been
9 marked as Government's Exhibit 3 to the clerk. It is a
10 recording of the entirety of that interview. We are not
11 planning to play it, unless the Court would like us to, but
12 have provided it to the Court for reference in this
13 hearing.

14 THE COURT: How long is it?

15 MR. DAKE: It is about 20 minutes -- 28 minutes,
16 Your Honor.

17 THE COURT: Ms. Cross Guns, do you have any
18 preference on it? I think it might be important.

19 MS. CROSS GUNS: You know, I think the fact that
20 the agent has indicated that she was cooperative and had no
21 issues until they expressed apparent disbelief, I don't know
22 that it's going to add --

23 THE COURT: All right. Well, I will -- any
24 objection to its admission, Ms. Cross Guns?

25 MS. CROSS GUNS: No.

1 THE COURT: All right. Exhibit 3 will be admitted.
2 I won't require us to play it now. I may listen to it after
3 the hearing.

4 (Exhibit Number 3 was admitted.)

5 THE COURT: So, both parties are aware that it's
6 part of the record and I'm free to go through it at my
7 leisure.

8 MR. DAKE: Thank you, Your Honor.

9 THE COURT: Go ahead, Mr. Dake.

10 MR. DAKE: Thank you, Your Honor. A moment,
11 please, Your Honor?

12 THE COURT: A moment.

13 MR. DAKE: Thank you.

14 (Discussion off the record.)

15 BY MR. DAKE:

16 Q. Sir, just some clarifications as far as dates and days of
17 the week. When you received this tip from the informant,
18 what day was that, sir?

19 A. Thursday.

20 Q. And that was October 15th?

21 A. October 15th, that's correct.

22 Q. And what day was the search conducted?

23 A. October 16th, Friday.

24 Q. Thank you, sir. And in your conversations with Ms. Little
25 Dog, when did she say that it was the last time that she had

1 | seen Mr. Gallardo?

2 | A. She had said that she had seen him prior to going to work
3 | Wednesday morning.

4 | Q. And the search, then, was conducted on Friday, correct?

5 | A. Correct.

6 | Q. And the tip that you received was that they had seen Ms.
7 | Little Dog with Mr. Gallardo how far back?

8 | A. The previous weekend.

9 | Q. So, based on that information, you had the tip saying that
10 | they were together the previous weekend and Ms. Little Dog
11 | stating that they were together earlier in the week,
12 | correct?

13 | A. Correct.

14 | Q. Special Agent, what would have happened had she not
15 | consented to the search of her residence? What would you
16 | have done?

17 | A. We would have had a discussion regarding possible exigency
18 | and/or applied for a warrant.

19 | Q. If you had obtained a warrant for Ms. Little Dog's
20 | residence, would that have included a search of the
21 | crawlspace area?

22 | A. It would have.

23 | Q. And was that where Mr. Gallardo was eventually found?

24 | A. Yes, it was.

25 | MR. DAKE: Thank you, sir.

1 A moment please, Your Honor?

2 THE COURT: Another.

3 MR. DAKE: Thank you.

4 (Discussion off the record.)

5 MR. DAKE: No further questions, Your Honor.

6 THE COURT: Thank you, Mr. Dake.

7 Ms. Cross Guns, cross-examination, please.

8 MS. CROSS GUNS: Thank you, Your Honor.

9 CROSS-EXAMINATION

10 BY MS. CROSS GUNS:

11 Q. Good afternoon.

12 A. Good afternoon, ma'am.

13 Q. And I will try to speak into this, because I have kind of
14 a soft voice.

15 THE COURT: That -- you can raise or lower that
16 podium as much as you need.

17 MS. CROSS GUNS: I think --

18 THE COURT: Mr. Dake had it way up. So, if you
19 need to lower it, go ahead.

20 MS. CROSS GUNS: I think I'll be okay.

21 THE COURT: Go ahead.

22 BY MS. CROSS GUNS:

23 Q. And I just have a few questions for you.

24 A. Yes, ma'am.

25 Q. I want to know, when you spoke to the small child that

1 | came out of Cheryl's house, did you identify yourself as law
2 | enforcement?

3 | A. (Pause) I can't remember how I identified myself, but I
4 | did have a big "FBI" on my chest (indicating).

5 | Q. Okay. Do you know if he can read?

6 | A. I do not.

7 | Q. Okay. Did you ascertain in your discussions with this
8 | child whether he could read or whether he understood anything
9 | you said to him?

10 | A. I did not.

11 | Q. Did you ascertain his grade level in school or if he was
12 | in school?

13 | A. I did not.

14 | Q. Do you know his age?

15 | A. Approximately, six.

16 | Q. How -- did he tell you that?

17 | A. No. I know that now.

18 | Q. Okay. But at the time, you didn't know?

19 | A. No.

20 | Q. Did you do anything to corroborate what he told you?

21 | A. As far as what?

22 | Q. Well, you indicated in your testimony that he said,
23 | Grandma is in there and her boyfriend, and it's my
24 | understanding that -- based on the reports, that there was
25 | another child, a 14-year-old child, that was either coming

1 out of the residence or coming to the residence that could
2 have corroborated. But it doesn't appear --

3 A. If I had been able to make contact with the 14-year-old
4 child, I would have liked to have done that.

5 Q. Okay. Where was she? Because it's unclear in your
6 report.

7 A. I did not see her.

8 Q. Okay. So, you had your -- did you have your guns drawn
9 when you spoke with the child?

10 A. No.

11 Q. Okay. When did you actually draw your weapon?

12 A. When the door began to open.

13 Q. Okay. And, so, the first thing that Ms. Little Dog might
14 see is a bunch of guns.

15 A. I would say that it's not common practice to stick your
16 gun into the face of someone opening a door, but I had it
17 readily available.

18 Q. Okay. You and others.

19 A. Others.

20 Q. And where were the guns pointed?

21 A. I can't tell you where everyone's gun was pointed.

22 Q. Where was your gun pointed?

23 A. To the ground.

24 Q. Okay. But in full view?

25 A. In full view, but secured to my person.

1 Q. What does that mean?

2 A. It means it's close-hold. It's not out here
3 (indicating).

4 Q. Right.

5 A. (Nods head affirmatively)

6 Q. Can you show me?

7 A. Here (indicating). If I had my gun out and I were making
8 entry into a building or a house, I would knock on the door
9 and have my gun close to my body. So that anything that came
10 out would not interfere with my firearm being overextended.

11 MS. CROSS GUNS: Okay.

12 THE COURT: Hold on. Mr. Zahaczewsky, so the
13 record is clear. It doesn't translate well with the court
14 reporter to have you move your arm around. So, explain where
15 your arm is when you were engaged in -- or engaged in a
16 close-hold of the weapon.

17 THE WITNESS: It is clenched close to my body,
18 pulled towards my chest.

19 MS. CROSS GUNS: Okay.

20 THE COURT: How many hands on the weapon?

21 THE WITNESS: It depends on if I was knocking on
22 the door at the time or if I was waiting for a response.

23 THE COURT: And where would the barrel be pointed?

24 THE WITNESS: Down and away.

25 THE COURT: Toward the ground?

1 THE WITNESS: Correct.

2 THE COURT: Okay. Go ahead, Ms. Cross Guns.

3 MS. CROSS GUNS: Thank you, Your Honor.

4 BY MS. CROSS GUNS:

5 Q. Okay. So, you had your guns drawn. And previous to that,
6 Deputy Bryce had indicated he might have to kick the door
7 down.

8 A. He did.

9 Q. Okay. (Nods head affirmatively) So, when you got in the
10 house and you did your search, the initial search, did you
11 find anything that might have belonged to Frank that appeared
12 to be a man's clothing or anything like that?

13 A. I observed this pair of cowboy boots in the first
14 bedroom.

15 Q. Okay. Men's cowboy boots.

16 A. Men's cowboy boots, correct.

17 Q. You didn't see anything about the search that indicated
18 that Mr. Gallardo might still be there.

19 A. That was all I saw. And that was a specific question I
20 asked earlier.

21 Q. Okay. I want to ask you just briefly about search warrant
22 procedure. Okay. So, you get a search warrant to search a
23 house for a person or items and you go to the house and you
24 don't find any of those, can you go back to the house on the
25 same warrant, or do you have to get a new warrant?

1 A. If you leave the premises and it's unsecured, you need a
2 new warrant.

3 MS. CROSS GUNS: Okay. Thank you.

4 THE COURT: Any more questions?

5 MS. CROSS GUNS: No, I'm done. Thank you.

6 THE COURT: All right. Redirect, Mr. Dake.

7 MR. DAKE: Thank you, Your Honor.

8 REDIRECT EXAMINATION

9 BY MR. DAKE:

10 Q. Special Agent, who showed the child the picture when you
11 were out front?

12 A. Deputy Bryce.

13 Q. Were you standing next to him at that point?

14 A. I was.

15 Q. Why did you -- what diverted your attention from the
16 child?

17 A. The locking of the door.

18 Q. And what did you do at that point, then, sir?

19 A. Directed my attention to the door.

20 Q. Did you focus on any other children that could have
21 possibly been in the front area?

22 A. I did not.

23 Q. Thank you, sir. Ms. Cross Guns asked you about where your
24 gun was located when Ms. Little Dog opened the door. Do you
25 remember that, sir?

1 A. She did.

2 Q. And at that point, you had already knocked a total of four
3 times, correct?

4 A. Correct.

5 Q. And you-all had identified yourselves as law
6 enforcement?

7 A. Correct.

8 MR. DAKE: Thank you, sir.

9 I have no further questions, Your Honor.

10 THE COURT: Is the witness excused?

11 MR. DAKE: He is. Thank you, Your Honor.

12 THE COURT: You may step down, Mr. Zahaczewsky.

13 THE WITNESS: Thank you, Your Honor.

14 THE COURT: Mr. Dake, call your next witness,
15 please.

16 MR. DAKE: Thank you, Your Honor. We call Deputy
17 Marshal Logan Bryce, please.

18 MS. CROSS GUNS: Your Honor, before we get into
19 this testimony, can we take a short break?

20 THE COURT: Sure. Let's take a five-minute break.

21 MS. CROSS GUNS: Thank you.

22 THE COURT: Mr. Bryce can get himself together.

23 (Recess taken.)

24 THE BAILIFF: The United States District Court is
25 back in session.

1 THE COURT: Please be seated. Mr. Dake.

2 MR. DAKE: Thank you, Your Honor. The United
3 States calls Deputy United States Marshal Logan Bryce.

4 CLERK OF COURT: Please raise your right hand.
5 (The witness was duly sworn.)

6 THE WITNESS: I do.

7 THE COURT: Good afternoon, Mr. Bryce.

8 THE WITNESS: Good afternoon, Your Honor.

9 THE COURT: Please state your full name and spell
10 your last name.

11 THE WITNESS: William Logan Bryce, B-R-Y-C-E.

12 THE COURT: Go ahead, Mr. Dake.

13 MR. DAKE: Thank you, Your Honor. Your Honor, for
14 record purposes, before Deputy Bryce testifies, will the
15 record reflect that he was outside of the courtroom during
16 the testimony of Special Agent Zahaczewsky?

17 THE COURT: The record will reflect.

18 MR. DAKE: Thank you, Your Honor.

19 DIRECT EXAMINATION

20 BY MR. DAKE:

21 Q. Good afternoon, sir.

22 A. Good afternoon.

23 Q. Can you please state your current position?

24 A. I am a Deputy United States Marshal.

25 Q. How long have you been in that position, sir?

1 A. Over 19 years.

2 Q. And just as a basic breakdown for the Court, what sort of
3 training have you received in this position?

4 A. I attended the U.S. Marshals Service Academy down at
5 FLETC, and I also attended the criminal investigator school
6 down at FLETC. I've attended multiple other trainings
7 throughout my career, both state and local.

8 Q. Have you received training regarding searching for
9 individuals?

10 A. Yes. I've done multiple trainings in regards to fugitive
11 investigations.

12 Q. Is that the primary work that you do, sir?

13 A. That is part of the work that I do.

14 Q. And what else is the portions of your work?

15 A. We do prisoner productions and we do protection of the
16 federal judiciary.

17 Q. Thank you, sir. Deputy Bryce, are you familiar with an
18 individual by the name of Cheryl Little Dog?

19 A. I am.

20 Q. Can you describe your previous interactions with Ms.
21 Little Dog, please?

22 A. I've known Cheryl for several years, mainly after she came
23 onto the council. The Blackfeet Reservation was having some
24 issues during 2013 and 2014 with the council, and during that
25 time I had the opportunity to have several contacts with her.

1 Also, I've had contact with Cheryl as she was a sitting
2 member on the Blackfeet council.

3 Q. And just as an overall character of Ms. Little Dog, what's
4 been your impression of Ms. Little Dog?

5 A. Cheryl is a very strong and authoritative woman, a proud
6 woman.

7 Q. Thank you, sir. Deputy Bryce, did you receive information
8 about a fugitive by the name of Frank Gallardo?

9 A. I did.

10 Q. Can you describe for the Court when you became aware of
11 Mr. Gallardo?

12 A. On October 15th, my supervisor notified me that FBI Shelby
13 had a fugitive up in Browning and was requesting some
14 assistance.

15 Q. What did you do at that point?

16 A. At that point, I did a work-up on the fugitive. I ran the
17 fugitive through NCIC to get a criminal background on him,
18 photographs, and a copy of the warrant.

19 Q. And why do you do all of that, sir?

20 A. Uhm, for fugitive work, you need to know the background of
21 the individual to know what you're up against and what extra
22 manpower you might need, equipment, and that sort of thing.

23 Q. Just in a general sense, after you complete the
24 background, would you treat an individual who has no criminal
25 history and maybe wanted for a white collar offense

1 differently than an individual with a substantial criminal
2 history wanted for a violent crime?

3 A. Yes.

4 Q. Thank you, sir. You reviewed Mr. Gallardo's criminal
5 history, correct?

6 A. I did.

7 Q. Can you provide the Court just a breakdown of Mr.
8 Gallardo's criminal history, as you remember it?

9 A. Mr. Gallardo had a long history stemming multiple years,
10 the majority of the criminal history was assaults, assaultive
11 behavior. There was one on there for assault, serious bodily
12 injury, stalking, and there was another one for -- I think a
13 misdemeanor drug and crimes against persons.

14 Q. And in a general sense, how far did this criminal history
15 span? Was it multiple years, or just one or two years?

16 A. No, it was multiple years.

17 Q. Thank you, sir. And where did you obtain this criminal
18 history from?

19 A. I pulled it through NCIC.

20 Q. And is that normally where you pull an individual's
21 criminal history?

22 A. That is correct.

23 Q. And it provides a criminal history of both federal and
24 state, correct?

25 A. That is correct. We do a search for -- the state, also, I

1 | can pull up state by doing a search just for the state off
2 | his state number.

3 | MR. DAKE: Your Honor, we would move to admit
4 | Government's Exhibit 2 with Mr. Bryce. We are not going to
5 | go through it with the Court. Mr. Bryce has already provided
6 | just a breakdown of the criminal history of Mr. Gallardo.
7 | Both Government's Exhibit 1 and Government's Exhibit 2 have
8 | been redacted to reduce any sort of personal identifiers. If
9 | the Court would like us to go into it, we certainly can, but
10 | Mr. Bryce has provided a breakdown.

11 | THE COURT: And Exhibit 2 is Mr. Gallardo's
12 | criminal history?

13 | MR. DAKE: It is, yes, Your Honor.

14 | THE COURT: All right. And that was obtained
15 | through the NCIC database?

16 | MR. DAKE: Yes, Your Honor.

17 | THE COURT: All right. Ms. Cross Guns, any
18 | objection?

19 | MS. CROSS GUNS: I just wanted to clarify that this
20 | is, in fact, what Mr. Bryce obtained.

21 | THE COURT: Mr. Bryce, this Exhibit Number 2, did
22 | you obtain this document, yourself?

23 | THE WITNESS: I did, Your Honor.

24 | THE COURT: When did you do that?

25 | THE WITNESS: This particular is the exact same as

1 | what was run. And it has a database that tells the last
2 | time, and it hasn't been updated since I ran it on October
3 | 15th. I pulled this one on 4/26/2016.

4 | THE COURT: So, let me clarify. The document in
5 | front of us has a date of April 26th, 2016, is this the same
6 | document you had in your possession on April 15th, 2016?

7 | THE WITNESS: Correct, Your Honor. At the top, as
8 | a matter of fact --

9 | THE COURT: Well, let me clarify. The contents of
10 | the document is the same, even though you downloaded this
11 | Exhibit 2 twelve -- eleven days later.

12 | THE WITNESS: Yes, sir.

13 | THE COURT: Okay. All right. Ms. Cross Guns,
14 | anything further?

15 | MS. CROSS GUNS: No. No.

16 | THE COURT: Any objection?

17 | MS. CROSS GUNS: No objection.

18 | THE COURT: All right. Exhibit 2 is admitted.
19 | (Exhibit Number 2 was admitted.)

20 | MR. DAKE: Thank you, Your Honor.

21 | BY MR. DAKE:

22 | Q. After you reviewed this information about Mr. Gallardo,
23 | what did you do after that, sir?

24 | A. After that, I contacted Mark Z., the agent that's out of
25 | the Shelby office, and we coordinated the time and the

1 location that we were going to meet and the type of equipment
2 we might need.

3 Q. And what day was this that you contacted Special Agent
4 Zahaczewsky?

5 A. That would have been on the 15th.

6 Q. Thank you, sir. And what did you decide to do, then, on
7 October 16th?

8 A. We decided that we would meet up. I had court in that
9 morning, so it would be in that afternoon. I would drive up
10 after court. And we would have a briefing, and we would
11 coordinate with some locals and attempt to do this warrant.

12 Q. How many individuals did you coordinate with?

13 A. Because of the sensitive nature with Cheryl on the
14 council, we coordinated with Glacier County primarily, and
15 then with BIA.

16 Q. How many officers were present at the initial briefing, if
17 you remember?

18 A. There would have been six.

19 Q. How many individuals went to Ms. Little Dog's residence on
20 that day?

21 A. That day, on the original contact with her, we had six
22 officers, uhm, some at its perimeter and then the main
23 group.

24 Q. Can you tell the Court who those six officers were that
25 were with you?

1 A. Yes. I had myself, Special Agent Mark Z., Mike Connelly
2 of Glacier County, and two BIA officers, and then one special
3 drug officer from Blackfeet.

4 Q. Thank you, sir. When you arrived at the house, where did
5 you park?

6 A. I was driving my vehicle, so myself and Special Agent Mark
7 Z., we drove right up into the driveway (indicating).

8 Q. What other cars were parked in front of Ms. Little Dog's
9 residence?

10 A. There was at least, I believe, two other vehicles there.
11 (Nods head affirmatively)

12 Q. And whose vehicle was that, sir?

13 A. Well, one would have been her vehicle. Uhm, I'm not sure
14 about the other vehicle.

15 Q. Were there any other law enforcement vehicles parked in
16 front of the residence?

17 A. No. We had one vehicle down the road that was sitting on
18 the front, and then there was a vehicle in the back, in the
19 alleyway.

20 Q. Whose vehicle was out in front?

21 A. I believe that the vehicle out in the front would have
22 been the Glacier County deputy, Mark -- Mike Connelly and his
23 BI -- or his Blackfeet officer.

24 Q. What did you do when you got out of the car?

25 A. Both myself and Mark Z. got out of the car and started up

1 towards the house. As we went up to the front of the house,
2 we noticed a young boy coming out of the house.

3 Q. Approximately how old was the child?

4 A. Six, seven years old, is what I would have said.

5 Q. Did you have an interaction with this child?

6 A. Mark Z. had the first interaction, started talking to him
7 and asked him some questions. And then after that, I asked
8 him to look at a photograph.

9 Q. Where did you have a photograph?

10 A. I had a photograph on my phone.

11 Q. And, so, what did you say to the boy?

12 A. I said, "Is this the individual or is this the man in the
13 house?"

14 Q. And what did the boy say to you?

15 A. "That's him."

16 Q. Did you say anything else to the boy?

17 A. I did not.

18 Q. What did you do at that point, then?

19 A. We headed to the front door.

20 Q. And the picture you showed him, was it a small picture, a
21 big picture? About how large was the picture that you showed
22 to the child?

23 A. Well, it was the size of an iPhone screen, so what is
24 that? Five, five-three, or something like that.

25 Q. Okay. Thank you. And it filled up the entire screen?

1 A. It did.

2 Q. Would the child have been able to see the photograph
3 fairly clearly on your phone?

4 A. It was a very good photo.

5 Q. Thank you. You approached the house, what happened next,
6 then, sir?

7 A. During the time that we were talking to the juvenile, we
8 did hear the door lock, like somebody was locking the top bar
9 on the door. Mark knocked once lightly. We waited quite a
10 bit of time. He knocked a second time. We waited quite a
11 bit of time. Knocked a third time. There was no response.
12 At that time, then, I knocked very heavily on the door.

13 Q. What did you say when you knocked?

14 A. I said, "Cheryl, come to the door or I'm going to kick it
15 in."

16 Q. What happened after that?

17 A. We could hear somebody from behind the door in a woman's
18 voice saying, Wait a minute and -- or, "Hold on," and the
19 door opened fairly quickly after that.

20 Q. Were you knocking on a screen door or an actual interior
21 door?

22 A. Interior door.

23 Q. All right. And what was --

24 A. It did have a screen door, though.

25 Q. Did you have the screen door open at that time?

1 A. Yes, I did.

2 Q. What happened when Ms. Little Dog came to the door?

3 A. She unlocked the door and opened the door widely. I was
4 the first in the door. And I said, Cheryl, we need to talk
5 about -- or "I'm looking for Frank Gallardo," is what I said
6 as I was coming into the house. Cheryl said, "He's not
7 here." Uhm, at that time, we started to move into the living
8 room and I started talking to Cheryl.

9 Q. Did Cheryl invite you inside of the house into the living
10 room area? How did that happen?

11 A. Well, as she opened the door, I came into the doorway
12 right there. She started to move backwards, back into the
13 living room as I was talking to her, and we both moved into
14 the living room.

15 Q. Was she talking with you at that same time?

16 A. Yes, she was.

17 Q. You moved into the living room with her, can you describe
18 what happened while you were in the living room?

19 A. I sat down beside her. She was in her wheelchair, and I
20 started conversing with her. At that time, Mark moved into
21 the hallway and stopped there. I think Mikey might have went
22 to the right towards the kitchen area, and I started talking
23 to Cheryl at that time.

24 Q. So, there were a total of three officers inside of the
25 house?

1 A. Yes.

2 Q. Can you talk to us about the guns. Did you have your gun
3 out, sir?

4 A. I do not believe at that time I had my gun out. I think I
5 had my taser out in the original part. Mark had his handgun
6 out, definitely.

7 Q. And what about Officer Connelly?

8 A. (Nods head affirmatively) Officer Connelly had his gun
9 out.

10 Q. So, two guns were out, and you had your taser out?

11 A. I believe I had a taser out.

12 Q. When you went into the living room to talk with Ms. Little
13 Dog, did you have your taser still out, or had you put it
14 away?

15 A. No, I had put it away. Because I had sat down to converse
16 with her.

17 Q. What did you talk to Ms. Little Dog about?

18 A. I tried to explain to her that we were here for Frank and
19 we were looking for him and we had reason to believe that he
20 was in the house. She steadfastly denied that he was in the
21 house, said, "He's not here. He left a couple days ago." I
22 think she said he left on Wednesday. And during that
23 conversation, I pressed her, and she said, "Well, he's not
24 here, you can look." We started looking and searching. I
25 talked to her about this is important, it's not about her,

1 it's about Frank and finding him, and that he had a valid
2 warrant and that he was a dangerous man.

3 Q. What was Ms. Little Dog's demeanor like during this
4 time?

5 A. (Pause) Her demeanor was like I had never encountered it
6 before. It was very cooperative, nice, pleasant, very
7 helpful.

8 Q. That was different than your previous interactions with
9 her?

10 A. Yes.

11 Q. What did she tell you about as far as searching the house?
12 Did she say that it was fine to search?

13 A. She said that he wasn't there and you can look, but we
14 didn't touch on that any more than that.

15 Q. What happened after that point?

16 A. Uhm, while they were going through the house, uhm, I was
17 talking to her about Frank, the warrant, and that this was a
18 serious thing, she has kids in the house, he was wanted for a
19 sex crime against children, and that she needed to tell me
20 the truth and not lie to me.

21 Q. As the search progressed in the house, did she become
22 nervous or anxious while you were sitting with her?

23 A. No, never.

24 Q. Did she ever tell you to stop searching?

25 A. No.

1 Q. What happened next, then, sir?

2 A. We continued to talk about Frank, how long he was there,
3 uhm, when he had left, how she could get ahold of him. Uhm,
4 she had said that she went to work on Wednesday morning, and
5 when she got home Wednesday afternoon, he was no longer
6 there. And that was the last time that she saw him, was that
7 Wednesday morning before she went to work.

8 Q. For clarification, what day of the week was this search?

9 A. (Pause) (Indicating) I think it was a Thursday.
10 Thursday?

11 Q. Okay.

12 A. The days run together. (Shakes head negatively)

13 Q. I understand. The date, though, was October 18th,
14 correct, sir?

15 A. The date of the search was going to be the 16th.

16 Q. I apologize. October 16th was the day of the search.

17 A. Yes.

18 Q. Thank you, sir.

19 A. I can't remember if it was a Thursday or a Friday at this
20 point.

21 Q. After this interaction with Ms. Little Dog, what happened
22 next? Did you find Mr. Gallardo in the house?

23 A. No, we did not find Mr. Gallardo.

24 Q. What did you do at this point?

25 A. At this point, we finished up. We gave her a card. I

1 attempted to get her to call him. She attempted to try to
2 call him for me. (Shakes head negatively) Uhm, that was not
3 successful. She was (shakes head negatively) very helpful in
4 this regard. And we had some small talk, and we left the
5 house.

6 Q. Where did you go after leaving the house?

7 A. All of us went down to the C Store. We went down there,
8 met up down at the C Store. We talked about what went on
9 with the search and that something just was not right.

10 Q. Why did you think something wasn't right?

11 A. The fact that the child positively identified that he was
12 in that house. And, specifically, for me, Cheryl's demeanor
13 and the way she acted towards me and with me just did not add
14 up. We had missed this guy.

15 Q. What did you decide to do at that point?

16 A. So, we talked briefly, and we decided together that we had
17 missed this guy, with myself and Mark, and we traveled back
18 to her residence.

19 Q. And who all was with you at this time?

20 A. Everybody else stayed away. It was just myself and Mark.
21 We both went up to the house. We knocked on the door.
22 Cheryl invited us in.

23 THE COURT: Hold on, Mr. Bryce. Let me interrupt
24 you for a minute.

25 THE WITNESS: Yes, sir.

1 THE COURT: How long did it take you to drive from
2 Ms. Little Dog's house to the C Store?

3 THE WITNESS: Your Honor, it's like two blocks
4 away. I bet we weren't there more than five or six
5 minutes.

6 THE COURT: You were at the C Store five or six?

7 THE WITNESS: Yeah. If that, Judge.

8 THE COURT: And how long back to Ms. Little Dog's
9 house?

10 THE WITNESS: We went straight there. So, like I
11 say, it's two blocks.

12 THE COURT: So, total, how long from the time you
13 left her house until you returned to her house?

14 THE WITNESS: Well under ten minutes.

15 THE COURT: Okay.

16 THE WITNESS: I would say somewhere in the
17 eight-minute range.

18 THE COURT: Go ahead, Mr. Dake.

19 MR. DAKE: Thank you, Your Honor.

20 BY MR. DAKE:

21 Q. You approached the house, did you have your firearms drawn
22 when you approached the house?

23 A. No, we did not.

24 Q. Did you have your firearm on you?

25 A. Yes.

1 Q. Did Special Agent Zahaczewsky have his firearm on him?

2 A. Yes.

3 Q. And when you went up to the house, did you knock on the
4 door?

5 A. We sure did. I did.

6 Q. And what did you say when you knocked?

7 A. Well, I knocked. I believe Cheryl said, Come in. We went
8 into the house. I explained to her that we had missed
9 something, we needed to talk.

10 Q. And, so, let's back up for just one moment, Deputy Bryce.
11 You knocked on the door and she said, "Come in," did she open
12 the door for you?

13 A. She opened the door for us, yes.

14 Q. And then you entered the house?

15 A. Yes.

16 Q. Where did you go at that point?

17 A. Right back to the living room where we were earlier in the
18 day.

19 Q. Did you have your firearm drawn at this point?

20 A. No.

21 Q. Did Special Agent Zahaczewsky have his firearm drawn?

22 A. No.

23 Q. What did you do at this point?

24 A. I started talking to Cheryl. I explained to her that,
25 "You know what? Something is just not matching up." And I

1 asked her if there was a crawlspace in the house, and she
2 told me, "No." I explained to her that right behind her
3 where her seating arrangement was for her wheelchair that
4 there was a vent in the floor, I said, "Well, there is a vent
5 there, there must be a crawlspace, and do you know where the
6 hatch is?" And she responded, "Well, it must be in the kids'
7 room, go look." At that time, we all moved to the kids'
8 room.

9 Q. And who all went to the kids' room?

10 A. Myself, Mark Z., and Cheryl.

11 Q. And what happened when you got into the kids' room area?

12 A. Uhm, Mark was over to the left. I went into the closet
13 area. Cheryl was right in the doorway. And we started to
14 look for the hatch.

15 Q. And did you find the hatch?

16 A. We did.

17 Q. And where was it located?

18 A. It was in the corner of the closet. It had been covered
19 up with loose clothing and an empty suitcase.

20 Q. What was Ms. Little Dog doing at this time?

21 A. Well, she was right there with us in the doorway. She had
22 been talking. And I'm not really sure what she said, it
23 didn't register with me. I was more focused on the
24 crawlspace.

25 Q. Did she ever tell you at any point to stop searching?

1 A. No.

2 Q. When you found the crawlspace cover, what did you do?

3 A. I pointed out to Mark Z., who was on the phone, that you
4 could see that there was loose clothing -- the hatch was
5 closed, but it wasn't permanently closed. Whomever had
6 closed it had done so in a hurry, so there was loose clothing
7 stuck in between the hatch lid and the bottom of the floor.

8 Q. What did you do at that point, then?

9 A. Mark got off the phone, and we both put our attention to
10 that. We opened -- I opened up the hatch -- or we opened up
11 the hatch and looked down into the crawlspace, and you could
12 see loose clothing down on the ground. And there was -- I
13 think it was a pink bra.

14 Q. What did you do after you saw that pink bra in the
15 crawlspace area?

16 A. I told Mark Z. that I was going to go down into the
17 crawlspace.

18 Q. And once you were down in the crawlspace, who did you
19 locate?

20 A. Ultimately, we located Frank in the crawlspace. (Nods
21 head affirmatively)

22 Q. At any of the time prior to going into the crawlspace or
23 once you were inside of the crawlspace, did Ms. Little Dog
24 tell you to stop searching?

25 A. Never.

1 Q. What happened when you came out of the crawlspace with Mr.
2 Gallardo?

3 A. Uh, he was arrested, and we moved him away. Uhm, at that
4 time, I believe we moved him outside. Mark talked briefly
5 with Cheryl and -- yeah, Mark was talking briefly with
6 Cheryl, and then I was outside getting him into the
7 Suburban.

8 Q. Was Ms. Little Dog in custody at this point?

9 A. Ms. Little Dog, after we found the fugitive in the
10 crawlspace, was put in cuffs.

11 Q. And why is that, sir?

12 A. For safety. For officers' safety. We ended up finding
13 the fugitive after all of that in her crawlspace; and until
14 we got things sorted out, she was put in cuffs.

15 Q. Did you have a conversation with Special Agent Zahaczewsky
16 about whether Ms. Little Dog would be arrested?

17 A. We talked briefly about that as far as maybe for harboring
18 a fugitive and that sort of thing. I kind of left that up to
19 Mark to deal with, and I went and dealt with the fugitive.

20 Q. And what was the ultimate decision, if you know, about
21 whether Ms. Little Dog was arrested for a federal offense at
22 that point?

23 A. At that point, we had decided no. Yes.

24 Q. Was she later arrested by tribal law enforcement?

25 A. She was later arrested by tribal.

1 Q. When did you become aware of that?

2 A. Uhm, after Mark got done doing an interview, while he was
3 in doing an interview with Cheryl, uhm, the tribal law
4 enforcement officers called their chief of police and called
5 members of the tribal council and decided that she would be
6 arrested for this.

7 Q. Did you make that decision to arrest Ms. Little Dog?

8 A. I did not.

9 Q. Deputy Bryce, if Ms. Little Dog had not consented to this
10 search, what would you have done?

11 A. If she would not have come to the door and opened the door
12 for us to go into the house or if she would have denied entry
13 to the house, we would have had to rethink what we were going
14 to do. We would have had two options: We could have either
15 went and got a warrant, or we could use exigent circumstances
16 to continue on in the house.

17 Q. What exigent circumstances were there, sir, that made you
18 think of that?

19 A. There were multiple, actually. Number one, the criminal
20 history of Frank Gallardo. Number two, talking to the small
21 child, knowing that there were children in the house, this
22 guy was charged with a sex offense against children, and he
23 had a large number of crimes against people gave me a lot of
24 thought. When the child identified positively to us that
25 this individual was in that house and then the door instantly

1 | locked while we were in front of that house, knowing that law
2 | enforcement were there, gave me considerable concern.

3 | Q. Did you also consider Ms. Little Dog's physical
4 | condition?

5 | A. I did. Because we knocked and we knocked. We knew that
6 | she was in there because of the child's statement, and then
7 | we never heard anything. So, at that time, as I was standing
8 | at the door, uhm, there could have been a possibility that
9 | the fugitive (indicating) was not allowing her to come to the
10 | door.

11 | Q. At any time, with your interaction with Ms. Little Dog in
12 | either the first or the second search, was she nervous or did
13 | she ask you to leave?

14 | A. Never. Actually, she was more than helpful through all of
15 | it.

16 | Q. Was there ever a time that she seemed anxious or upset by
17 | law enforcement being present in her house?

18 | A. Not even in the least.

19 | MR. DAKE: A moment please, Your Honor?

20 | THE COURT: A moment.

21 | MR. DAKE: Thank you.

22 | (Discussion off the record.)

23 | MR. DAKE: No further questions, Your Honor.

24 | THE COURT: Ms. Cross Guns.

25 | MS. CROSS GUNS: Thank you, Your Honor.

CROSS-EXAMINATION

1
2 BY MS. CROSS GUNS:

3 Q. Can I call you "Logan"?

4 A. You sure can, Roberta.

5 Q. Thank you.

6 A. Thank you.

7 Q. I've known you long enough, I --

8 A. Yes, ma'am.

9 Q. -- feel more comfortable that way. I want to explore a
10 couple of things. First of all, I want to talk about the
11 child. And I want to know, did you identify yourself to him
12 as law enforcement or anything like that?

13 A. Both -- yes, ma'am.

14 Q. Okay. All right. So, he knew you were law enforcement.

15 A. There was no doubt that we were law enforcement.

16 Q. Well, did you tell him that?

17 A. We both had tactical vests on that said, "Police," "U.S.
18 Marshal," "FBI," and there was no way to not know that we
19 were law enforcement.

20 Q. Okay. Do you know if he can read?

21 A. He might not be able to read. I don't know that. (Shakes
22 head negatively) But I had a great big badge, and he can't
23 miss that.

24 Q. Okay. All right. Very good. So, I want to talk a little
25 bit about your relationship with Cheryl. You indicated that

1 her behavior at her home was different than other encounters
2 that you had had with Ms. Little Dog, can you tell me a
3 little bit about previous encounters? What were the nature
4 -- what was the nature of those?

5 A. Some of those encounters were, uhm, (pause) aggressive, I
6 guess. Not for me, but her dealing with law enforcement and
7 other people in the community. During the 2013 year, in the
8 fall of 2013 there was a lot of uprising, upheaval in the
9 council, and a lot of that time was with Cheryl being on one
10 side of the council, and the other side of the council being
11 split, and that created a lot of problems that the local law
12 enforcement was dealing with. That was a lot of the context
13 that I had had with -- I had observed her in during that
14 time.

15 Q. Okay.

16 A. Other times have been with the law and justice meetings
17 within the council, itself. Cheryl tended to be very sure of
18 herself, vocal and outgoing during those meetings in many
19 areas.

20 Q. Authoritative, as you said.

21 A. Yes, ma'am.

22 Q. Okay. Had you ever been to her house before?

23 A. (Pause) I do not believe so. (Shakes head negatively)

24 Q. So, the context of your previous encounters involved
25 politics. Would it be fair to say that?

1 A. Not always politics. Even on the council side, it would
2 be, say, (indicating) we did training before with the
3 council. And that had nothing to do with politics at the
4 time, it was straight-up training. And she could -- she was
5 a very forceful person (nods head affirmatively) in her
6 views.

7 Q. Okay.

8 THE COURT: Let me clarify, Ms. Cross Guns.

9 MS. CROSS GUNS: Thank you.

10 THE COURT: So, Mr. Bryce, Ms. Cross Guns used the
11 word "politics," is it fair to say that your previous
12 encounters with Ms. Little Dog involved -- that she was
13 serving in her official capacity?

14 THE WITNESS: Yes, Your Honor.

15 THE COURT: You had no previous dealings with her,
16 where you were law enforcement and she was the subject of any
17 kind of investigation or encounter.

18 THE WITNESS: No, sir.

19 THE COURT: Okay. Go ahead.

20 MS. CROSS GUNS: That's exactly what I wanted to
21 know.

22 BY MS. CROSS GUNS:

23 Q. I want to ask you a little bit about the firearms. So,
24 when you knocked forcefully on the door, finally, and said
25 that, "I'm going to kick the door in," when she came to the

1 door, then, did you have some weapon in your hand?

2 A. Yes, ma'am.

3 Q. What did you have?

4 A. I believe I had my taser.

5 Q. Okay. And how do you hold that when you're going into
6 somebody's house, when you're feeling threatened?

7 A. Usually, it's -- if I'm going into the house, it would be
8 midsection on my vest (nods head affirmatively) held close to
9 my chest.

10 Q. And you use both hands (indicating)?

11 A. No.

12 Q. Just one?

13 A. In that case, I would not have used both hands, if it was
14 a taser.

15 Q. Okay. And, so, you would be pushing the door open with
16 the taser in the other hand?

17 A. I didn't have to push the door open.

18 Q. Okay. Okay. Very good. Was there any time while you
19 were there that others had firearms drawn?

20 A. During the first encounter, everybody had firearms
21 drawn.

22 Q. Okay. And how many -- when you say "everybody," how many
23 is that?

24 A. That would have been initially three. I think a fourth
25 finally showed up a little later in the operation.

1 Q. So, at some point there were four firearms drawn during
2 the search; is that correct?

3 A. Yes.

4 Q. And, so, as they are going around the house with their
5 firearms drawn, how does that look? I've never had this
6 happen to me, so I don't know. Are they -- you know, I watch
7 TV and I see them, you know, going around corners like this
8 (indicating) and, you know --

9 A. It's coordinated.

10 Q. Okay. So explain that to me.

11 A. Well, as I was sitting down right next to Cheryl talking
12 to her, the officers would have been working as pairs to
13 clear the rooms. They were seeking a very dangerous
14 individual, and so they used a vehicle of safety unto
15 themselves.

16 Q. Okay. So, at that point you -- you say he was "a very
17 dangerous individual;" but when you went back the second
18 time, there were no guns drawn, why not?

19 A. That is correct. Because the second time we were acting
20 on what both Mark and I thought was -- (shakes head
21 negatively) we knew that we had missed this guy, but (nods
22 head affirmatively) we were giving Cheryl the benefit of the
23 doubt. We knocked. She invited us in. We told her what was
24 going on, and she allowed us to do what we did.

25 Q. My point being that if you believed him to be in the house

1 even then, why didn't you have your guns drawn?

2 A. Because Cheryl -- for multiple reasons. Cheryl is a
3 councilwoman at the time. She is in a wheelchair.

4 Q. Uh-huh.

5 A. And we did not want to raise the level any higher than it
6 already was.

7 Q. Okay.

8 A. And if she would not have let us in, then we would have
9 had to go our separate ways.

10 Q. Okay.

11 A. Although, I will tell you that, you know, that would have
12 been it. (Nods head affirmatively)

13 Q. Okay. So, in this instance if you had gotten an actual
14 search warrant to go into her house, the procedure on a
15 search warrant, if you go in the first time and you don't
16 find what you're looking for, can you return on that same
17 warrant, or do you have to go get a new warrant?

18 A. (Pause) I'm not really sure on the answer to that
19 question. I believe that if I had -- (shakes head
20 negatively). I -- (shakes head negatively) that's a good
21 question.

22 Q. So, in other words, if you went the first time, whether
23 the guns are drawn or not, I don't care, but you have a
24 warrant, a valid search warrant, and you don't find what
25 you're looking for, and you leave and you reconvene at the C

1 Store and five minutes later come back, can you rely on that
2 same warrant?

3 A. That wasn't the case here.

4 Q. But let's say it was.

5 A. That's a hypothetical.

6 Q. Okay. (Nods head affirmatively) I want to talk about
7 locking the door.

8 A. Okay.

9 Q. Have you ever been to Cheryl's house before? I think you
10 said no.

11 A. No.

12 Q. Okay. Do you know whether it is her practice as a person
13 in a wheelchair to lock the door when people come and go?

14 A. No.

15 Q. Is there a window in her door?

16 A. Well, there's a screen in her door. I believe there was a
17 window.

18 Q. In the door to the house that you were banging on
19 (indicating)?

20 A. I do not believe there was, no.

21 Q. Is there a peephole so she could look out and see who is
22 there?

23 A. Well, if it was, it would -- she was in a wheelchair, that
24 would be pretty tough for her.

25 Q. It would have to be low, wouldn't it? Okay. So, you

1 don't know, as we sit here today, whether it's her practice
2 to lock the door, and whether she even knew for sure who was
3 at the door.

4 A. As answered before, no. (Shakes head negatively)

5 Q. (Nods head affirmatively) When you -- you testified
6 earlier that you went and assessed options, can you explain
7 what you mean by that?

8 A. I believe the question was, if my memory serves me right,
9 counsel asked me whether or not -- if we would not have
10 gained entry, what would you do? I would have researched
11 options. We didn't do that.

12 Q. Okay. I want to talk a little bit about the
13 dangerousness, because you kind of raised it when you talked
14 about the criminal history. Do you have a copy of this?

15 A. I do not.

16 MS. CROSS GUNS: Can we -- you put it on the
17 screen?

18 THE COURT: What is "this"? The --

19 MS. CROSS GUNS: "This" is Exhibit --

20 THE COURT: 1?

21 THE WITNESS: 2.

22 MS. CROSS GUNS: 2.

23 THE COURT: 2. Okay.

24 BY MS. CROSS GUNS:

25 Q. And I'm going to ask that we go to Page 10. These

1 criminal histories are always a surprise to me to try to
2 read. But I see at the top of Page 10, we have a charge of
3 marijuana possession, and it appears to be in 1995; is that
4 correct?

5 A. Yes, ma'am.

6 Q. Okay. And it doesn't show how that was resolved, it just
7 says "charged," correct?

8 A. That's correct.

9 Q. Then in 1996, actually just a few months later, we have an
10 assault that shows up in Pueblo, Colorado, but it says he's
11 arrested for another jurisdiction. Do you see that?

12 A. Yes, ma'am.

13 Q. And, that, right after that, if you see where it says
14 "charged literal," it says "assault," and then it says,
15 "statute, assault, 1399." Do you see that?

16 A. Yes, ma'am.

17 Q. Then if you jump down the page to Cycle 3, it shows
18 assault in Denver. Is that the same charge, and is this the
19 other jurisdiction for which he was arrested?

20 THE WITNESS: Scroll back up a little bit? You
21 notice the arrest date was 1996 on that one.

22 BY MS. CROSS GUNS:

23 Q. I do.

24 A. The arrest date on Cycle 3 is 1997. Totally different
25 charge, different date.

1 Q. Well, except that it said that it was an arrest for
2 another jurisdiction, so that -- it's just unclear. We don't
3 know (indicating) if they are separate charges.

4 A. They are separate charges.

5 Q. Okay.

6 A. I'm pretty sure.

7 Q. Okay. So, then, in '97, another assault, in your opinion.
8 So, two assaults and a marijuana. That's in '97. And,
9 again, it doesn't show how that was resolved. But we go to
10 2010, now three years later. Yes?

11 A. Yes, ma'am.

12 Q. Shows the crimes against person, a misdemeanor. And then
13 2011, misdemeanor, crimes against person, and then it says --
14 it actually has a disposition, "Dismissed by the DA."
15 Correct?

16 A. Yes, ma'am.

17 Q. Okay. And it's really unclear whether these are all of
18 the same event and whether they are -- they come out in what
19 is called Cycle 4. So, it's unclear whether the disposition,
20 then, in 2011 was for the charge we see in 2010, because it
21 was September, it was resolved in January. Is that correct?

22 A. That is correct, but they are separate.

23 Q. How can you tell?

24 A. The arrest date, the arresting agencies. If we look at
25 case numbers.

1 Q. Oh. So, show me the arrest date for the 2011.

2 A. Is that back up at Cycle 4?

3 Q. These are all in Cycle 4.

4 A. (Viewing document)

5 Q. They appear to be the same event.

6 A. Well, the case numbers and the docket numbers aren't

7 alike. So, --

8 Q. Well, I don't see --

9 A. I can't say one way or another. When it's entered into
10 the NCIC, that's good enough for me.

11 Q. Okay. So, but they said here --

12 A. That means that person had been printed for this charge at
13 one time or another, and charged with this at one time or
14 another.

15 Q. Right.

16 A. Which is usually how they end up getting onto the NCIC.
17 They are arrested, they are charged, they are printed, and
18 that makes the entry into NCIC.

19 Q. Okay. But you see all of these are the same charge, and
20 it says it's dismissed by the DA. It's all in Cycle 4. They
21 are just a few months apart on the arrest date and the
22 disposition date. It appears to be the same event, and it
23 was dismissed.

24 A. Okay.

25 Q. Okay. So, in 2012, we have the next assault, which is, I

1 | believe, the one that the warrant was issued for. Because
2 | it's Pueblo, it's about the right time, and I don't see
3 | anything new after that.

4 | A. Actually, the assault that's for -- this warrant wasn't
5 | out of Pueblo, it was going to be a federal charge for sexual
6 | abuse of a minor. Not this serious bodily injury or this
7 | assault or this reckless cause of injury.

8 | Q. Well, it's my understanding that there was another warrant
9 | and that it came out of Pueblo. Am I misunderstanding
10 | that?

11 | A. Yeah. I believe it's still open.

12 | Q. Okay. Okay. So, out of these as you called it or
13 | describe it as "several years," there's really only about
14 | three or four charges.

15 | A. Correct. On this current case, though, with their
16 | interaction with him fleeing his jurisdiction where the crime
17 | took place, we received information from the FBI in that
18 | jurisdiction that he had had a gun and he had fled from the
19 | local police on multiple occasions right before this
20 | arrest.

21 | Q. Right before the October --

22 | A. Right before we arrested him, correct.

23 | Q. Before you arrested him. Okay.

24 | A. And that is information that we take into account when
25 | setting up an operation for an arrest.

1 Q. You know, there was some testimony before, and now you've
2 raised it, with regard to the fleeing, do you know any of the
3 circumstances of that?

4 A. No, ma'am.

5 Q. Do you know if it was related to the other -- the warrant
6 it charged, or, I mean --

7 A. No, ma'am.

8 Q. Okay. And do you know what kind of a firearm it was?

9 A. No, ma'am.

10 Q. And do you know if it was discharged towards anyone?

11 A. I do not know.

12 Q. Okay. So, when you first went there, you had a lot of
13 firearms drawn and describe it as, perhaps, exigent
14 circumstances, but when you go back, there is none.

15 A. We didn't have exigent circumstances. She let us in on
16 the first go.

17 Q. Okay. (Nods head affirmatively) And like you said, you
18 know Cheryl, you know she is in a wheelchair, you know she
19 has difficulty getting around, do you think it might be a
20 little intimidating for her to hear you say you are going to
21 kick her door in? A little frightening?

22 A. No, I don't.

23 Q. And you don't think it would be frightening for people to
24 come filing through the house with weapons drawn?

25 A. It could be, yes.

1 Q. Do you think it was for Cheryl?

2 A. No.

3 MS. CROSS GUNS: Thank you. I have nothing
4 further.

5 THE COURT: Redirect, Mr. Dake.

6 MR. DAKE: Thank you, Your Honor.

7 REDIRECT EXAMINATION

8 BY MR. DAKE:

9 Q. Deputy Bryce, I would like to discuss the firearms. Your
10 firearm was never out when you were talking to Ms. Little Dog
11 in the living room, correct?

12 A. It was not. (Shakes head negatively)

13 Q. Either the first or the second time?

14 A. No. (Shakes head negatively) Neither.

15 Q. Thank you. Ms. Cross Guns asked you about the officers
16 who were searching the residence, and they had their firearms
17 out, correct?

18 A. Yes, sir.

19 Q. Did Ms. Little Dog appear nervous at the firearms being
20 drawn during this time?

21 A. No, sir, not at all.

22 Q. When you came back to the house for the second search, you
23 had already cleared the house; is that correct?

24 A. Yes, sir, we had.

25 Q. And the only place that you hadn't checked was in the

1 | crawlspace area?

2 | A. Yes, sir.

3 | Q. When you entered the crawlspace area, did you take your
4 | gun out at that time?

5 | A. Yes, sir, I did.

6 | Q. But that was the only time during the second encounter
7 | that you had your firearm out?

8 | A. That is correct. (Nods head affirmatively)

9 | Q. Deputy Bryce, how long have you been a United States
10 | Marshal?

11 | A. Over 19 years.

12 | Q. How many criminal histories have you reviewed during that
13 | time period?

14 | A. Hundreds.

15 | Q. Do you assess and investigate the disposition of every
16 | offense that is on a criminal history?

17 | A. No, sir, because I understand how they get there. (Nods
18 | head affirmatively)

19 | Q. And in your assessment of Mr. Gallardo's criminal history,
20 | what did you determine?

21 | A. He was a violent individual. (Nods head affirmatively)

22 | MR. DAKE: Thank you very much. No further
23 | questions, Your Honor.

24 | THE COURT: Ms. Cross Guns.

25 | MS. CROSS GUNS: Can I ask another question?

1 THE COURT: You may.

2 MS. CROSS GUNS: Thank you, Your Honor.

3 RECROSS-EXAMINATION

4 BY MS. CROSS GUNS:

5 Q. You were just asked if you had cleared the house at the
6 end of the first search and then you came back without guns
7 because you had cleared the house, you don't believe in those
8 five minutes or eight minutes, or however many minutes, that
9 if Frank had been there he couldn't have come out from
10 wherever he was hiding? Because you clearly believed he was
11 still in the house.

12 A. (Pause) What is the question?

13 Q. The question is did you just not believe he was dangerous
14 anymore?

15 A. No. Out of respect to your client, we took the higher
16 road, and we (nods head affirmatively) took a road less safe
17 for us out of respect for her.

18 MS. CROSS GUNS: Okay. Thank you.

19 THE COURT: Anything else, Mr. Dake?

20 MR. DAKE: No, thank you, Your Honor.

21 THE COURT: The witness excused?

22 MR. DAKE: He is. Thank you, Your Honor.

23 THE COURT: You may step down, Mr. Bryce. Thank
24 you.

25 THE WITNESS: Thank you, Your Honor.

1 THE COURT: Mr. Dake, your next witness.

2 MR. DAKE: Your Honor, the United States has no
3 further witnesses.

4 THE COURT: Thank you, Mr. Dake.

5 Ms. Cross Guns, are you going to call any witnesses?

6 MS. CROSS GUNS: No.

7 THE COURT: Okay. Mr. Dake, do you want to make
8 argument?

9 MR. DAKE: Thank you, Your Honor.

10 Your Honor, in our response brief we've outlined,
11 certainly, the issue that's plaguing the Court here, and,
12 basically, it's whether or not the search of a third party's
13 residence with an arrest warrant is lawful when there is
14 consent given, or, in the alternative, whether there are
15 exigent circumstances.

16 THE COURT: So, you would agree that if there is no
17 consent, there is no exigent circumstances, a warrant is
18 required to search a third party's home, even when you're
19 trying to execute an arrest warrant.

20 MR. DAKE: For an arrest warrant, yes, Your Honor.

21 THE COURT: Okay.

22 MR. DAKE: That is clearly stated, and that's the
23 law that's specifically laid out in the Steagald versus
24 United States case, which I believe is 1970s or '80s.

25 THE COURT: Okay. So, do you believe the officers

1 had consent for the first search?

2 MR. DAKE: Yes, Your Honor.

3 THE COURT: All right. And where did that come
4 from?

5 MR. DAKE: So, the consent happened, quite frankly,
6 Your Honor, when Deputy Bryce, as he has just testified, went
7 inside of the house. First of all, the door was opened by
8 Ms. Little Dog. She opens the door, she allows them to come
9 into the residence and sits down with Deputy Bryce at that
10 time.

11 She talks to Deputy Bryce. Deputy Bryce explains why he
12 is at the residence and what they are doing there. And they
13 explained to her, quite frankly, that they are not there
14 looking for her or anything that she has going on, that they
15 are looking for him (indicating).

16 THE COURT: All right. Let me stop you. Officers,
17 several with guns drawn and one with a taser, knock on the
18 door. Ms. Little Dog opens the door inward, allows the
19 agents to enter the house.

20 MR. DAKE: Yes, Your Honor.

21 THE COURT: That's what happened, you're telling
22 me.

23 MR. DAKE: Yes, Your Honor.

24 THE COURT: All right. Now, at what point does the
25 agent ask Ms. Little Dog, "Can we search your house?"

1 MR. DAKE: That doesn't happen until Deputy Bryce
2 sits down with Ms. Little Dog. And then you heard the
3 testimony of Special Agent Zahaczewsky, which is he came into
4 the hallway area and was calling out to Mr. Gallardo, in --
5 while he was standing in the hallway, but was waiting until
6 he heard what he was going to do next.

7 And, as he stated in his testimony, he overheard the
8 conversation between Deputy Bryce and Ms. Little Dog, showing
9 that Ms. Little Dog was compliant. At that point, they
10 decided to search.

11 THE COURT: All right. Hold on. She was
12 compliant. What does that mean?

13 MR. DAKE: That was what was described by Special
14 Agent Zahaczewsky and Deputy Bryce.

15 THE COURT: Well, I took pretty careful notes.
16 What I have is Mr. -- or Mr. Zahaczewsky testified that he --
17 or, I'm sorry, Mr. Bryce testified that when the agents came
18 on the first search, they came into the house, explained the
19 purpose of their visit, about Mr. Gallardo's presence --
20 possible presence.

21 Mr. Bryce testified that Ms. Little Dog stated, "He
22 isn't here. You can look."

23 MR. DAKE: Yes, Your Honor.

24 THE COURT: All right. So, that strikes me as some
25 kind of consent.

1 MR. DAKE: Yes, Your Honor.

2 THE COURT: All right. Now, the search ends.

3 MR. DAKE: It does, yes, Your Honor.

4 THE COURT: The agents leave the house. And as Mr.
5 Zahaczewsky testified, they left it unsecured. Everyone
6 left. No one was there to -- no police tape up, no one was
7 there to secure the house. Do you agree?

8 MR. DAKE: Yes, Your Honor.

9 THE COURT: All right. Now, I'm not going to hold
10 Mr. Zahaczewsky to a legal standard, he testified it was his
11 understanding that when they left -- if they had a warrant
12 for the first search, that, when they left, they would need
13 to get a new warrant to come back. And Mr. Bryce equivocated
14 that he's not a lawyer, he wouldn't know that, but I think
15 that's the law.

16 MR. DAKE: It is, yes, Your Honor.

17 THE COURT: Okay. You agree with that.

18 MR. DAKE: We do.

19 THE COURT: Now, we have a returned visit by
20 Mr. Bryce and Mr. Zahaczewsky, and where in the record do we
21 have affirmative consent from Ms. Little Dog?

22 MR. DAKE: And can I answer that question after I
23 address one point, Your Honor, --

24 THE COURT: You may.

25 MR. DAKE: -- regarding the warrant aspect?

1 THE COURT: You may.

2 MR. DAKE: The warrant aspect, quite frankly, Your
3 Honor, they wouldn't have been able to obtain a warrant in
4 that -- for that first search. They didn't have probable
5 cause, necessarily, at that point.

6 THE COURT: Well, we have consent.

7 MR. DAKE: Right.

8 THE COURT: We have a consent. That's an
9 exception. But there is testimony, unrefuted by Mr. Bryce,
10 that Ms. Little Dog stated, "He isn't here. You can look."

11 MR. DAKE: Yes, Your Honor.

12 THE COURT: Ms. Little Dog didn't testify or refute
13 that, Ms. Cross Guns didn't cross examine regarding that
14 point. So, I think that's established.

15 MR. DAKE: I agree. Yes, Your Honor. I was just
16 clarifying the point of the warrant, of whether or not they
17 would have, at that point, had the ability to get one.

18 THE COURT: No, I understand. The question of
19 whether they could have gotten a warrant the first time.
20 They asked for consent, and they got it, so they didn't need
21 a warrant.

22 MR. DAKE: Yes, Your Honor. And then --

23 THE COURT: Okay. Go ahead.

24 MR. DAKE: -- the -- the testimony from Deputy
25 Bryce was that when they came back to the house, he, again,

1 | knocked. He only had to knock one time. Ms. Little Dog,
2 | again, came to the door, opened the door for him. He
3 | followed her, again, inside, to the same living room, and he
4 | testified that he told her, Ms. Little Dog, we think there is
5 | something more in this house, we think that there is a
6 | crawlspace, to which she said there is not a crawlspace, go
7 | look.

8 | THE COURT: Well, so, Mr. Bryce testified, from my
9 | notes, that he and Mr. Zahaczewsky returned. He explained
10 | that they felt they had missed something in the first search.
11 | He testified that no one had guns drawn at that point. He
12 | testified that Ms. Little Dog denied the existence of a
13 | crawlspace in the house.

14 | Do you agree with all of that?

15 | MR. DAKE: Yes, Your Honor.

16 | THE COURT: Okay. He testified that he asked Ms.
17 | Little Dog as to whether there -- he pointed out the vent in
18 | the floor behind her wheelchair. Do you recall that
19 | testimony?

20 | MR. DAKE: Yes, Your Honor.

21 | THE COURT: All right. And, then, Mr. Bryce
22 | testified that Ms. Little Dog stated that the hatch -- he
23 | asked her about a hatch to the crawlspace, and she said it
24 | must be in the kids' room. And Mr. Bryce testified that the
25 | agents went to the kids' room, found the hatch in the corner

1 of the closet.

2 MR. DAKE: Yes, Your Honor.

3 THE COURT: I don't recall testimony about her
4 saying go ahead and look for a hatch, go ahead and search my
5 crawlspace. Was it there?

6 MR. DAKE: I don't think they said -- the words
7 weren't go ahead and look, Your Honor. I believe, in the
8 testimony, that it was Deputy Bryce saying that when he
9 expressed that, regarding the crawlspace, she said something
10 to the extent of go look. And I believe that was what his
11 testimony was here.

12 THE COURT: Well, I'll check the transcript about
13 that. I won't hold you to who took better notes. You asked
14 Mr. Zahaczewsky several times, and Mr. Bryce several times,
15 you said at any point did Ms. Little Dog tell you to stop
16 searching. Do you recall those questions?

17 MR. DAKE: Yes, Your Honor.

18 THE COURT: All right. And they always answered
19 that she never did tell them to stop searching.

20 MR. DAKE: Yes, Your Honor.

21 THE COURT: All right. So, my concern is did Ms.
22 Little Dog give affirmative consent for the second search?

23 MR. DAKE: I believe she did, Your Honor. And I
24 believe the record reflects that. It reflects it not only in
25 the explicit consent that she gave when she said, "Go look,"

1 or however it appears in the transcript, Your Honor, of what
2 Deputy Bryce said, but, then, as well as the consent that she
3 gives by accompanying law enforcement to the back of the
4 room. She --

5 THE COURT: Well, wait a second. You -- put
6 yourself in Ms. Little Dog's position.

7 MR. DAKE: I'm sorry, Your Honor?

8 THE COURT: I said put yourself in Ms. Little Dog's
9 position for a moment. You've got two agents in your
10 house -- I'll check the transcript, I don't know what
11 happened -- they take off for the bedroom. Are you going to
12 sit -- going to stand or sit in the living room, or are you
13 going to follow them and see what they are doing in your
14 house? Well, is that an indicia of consent, the fact that
15 she follows the agent?

16 MR. DAKE: No, Your Honor, but I think it further
17 supports the consent. She didn't follow the agents down in
18 the first search, Your Honor.

19 THE COURT: So, there were half a dozen of them in
20 the first search.

21 MR. DAKE: Your Honor --

22 THE COURT: Who is she supposed to follow?

23 MR. DAKE: Well, I believe there were only three,
24 besides Deputy Bryce, who were inside of the --

25 THE COURT: Okay.

1 MR. DAKE: Inside of the house, Your Honor.

2 THE COURT: I exaggerated.

3 MR. DAKE: Thank you, Your Honor. But I believe
4 what happened at that point is that once she had said it is
5 in this back bedroom, she accompanied them to that back
6 bedroom. And I think that shows that she is consenting, and
7 saying, yes, go ahead and look in this back bedroom, I'm
8 coming with you.

9 THE COURT: She is either consenting, or resigning
10 herself to the fact that they are going to look.

11 MR. DAKE: And, quite frankly, Your Honor, we don't
12 have the testimony to support either side of that, Your
13 Honor. And, so, the inference would be, quite frankly, that
14 she is going with them to accompany them during the search of
15 this residence.

16 THE COURT: Is an inference sufficient consent to
17 justify a warrantless search?

18 MR. DAKE: It is, combined with what she told
19 Deputy Bryce, yes, Your Honor.

20 THE COURT: All right. I'll have to look at the
21 transcript more carefully about what she told Mr. Bryce.

22 Go ahead. I jumped into your argument early.

23 MR. DAKE: Well, and I'm not even sure, quite
24 frankly, that the argument regarding consent is -- given the
25 cross-examination and what was done in the briefing, that

1 consent aspect is the issue. The issue more so being whether
2 that consent was coerced, or whether or not there was,
3 basically, without an ability to say no. And I think that
4 might be more of the issue, quite frankly, Your Honor.

5 THE COURT: Well, I mean, the purpose of this
6 hearing, Mr. Dake, is to develop a factual record on which I
7 can evaluate the totality of the circumstances to determine
8 whether Ms. Cross -- Little Dog voluntarily consented to the
9 search. That's one possible exception to the warrant that
10 the agents admittedly did not have.

11 MR. DAKE: Yes, Your Honor.

12 THE COURT: All right. The other purpose is to
13 determine, from those facts that were developed, whether
14 sufficient exigent circumstances existed to justify a warrant
15 to search by the agents.

16 MR. DAKE: Yes, Your Honor.

17 THE COURT: So, at some point -- you know, I don't
18 think you can fall back on, well, no one argues against
19 consent in the briefs. The burden is on the government to
20 show that the search was valid. A warrantless search,
21 presumptively, is invalid, unless a couple of circumstances
22 apply.

23 So, I need to look at the record for a valid -- of proof
24 that the -- that Ms. Little Dog gave her consent to the
25 search, don't I?

1 MR. DAKE: I agree completely, Your Honor. And I
2 believe -- but I believe that the consent was given in both
3 of the two searches.

4 THE COURT: Well, we have -- the first search,
5 we've got unrefuted testimony by Mr. Bryce that Ms. Little
6 Dog states, "He isn't here. You can look." I'm not sure how
7 much clearer you can get than that, "you can look."

8 MR. DAKE: Yes, Your Honor.

9 THE COURT: But I don't have notes to that kind of
10 testimony with regard to the second search.

11 MR. DAKE: And, quite frankly, Your Honor, I can't
12 see what the transcript says.

13 THE COURT: Right. Well, we will deal with the
14 transcript. But my question for you is, is that kind of
15 affirmative consent required, or can it be inferred through
16 shoulder shrugs or a lack of objection or --

17 MR. DAKE: Your Honor, no, it can't be. It's
18 not --

19 THE COURT: So, if agents pound on the door and
20 say, "Federal agents, we are here to search, we are looking
21 for Mr. Gallardo," and if Ms. Little Dog said nothing and the
22 agents went in and did their search, would we have consent?

23 MR. DAKE: I believe that would not, under those
24 circumstances --

25 THE COURT: All right. So, I agree that the first

1 search, that we do have consent. There is clear evidence,
2 Mr. Bryce testified that Ms. Little Dog gave the consent. We
3 can set that out in the transcript, but I just wanted to
4 clarify what the law would be.

5 Go ahead, then.

6 MR. DAKE: And, so, I think that, on that point,
7 Your Honor, consent has to be given under a totality of
8 circumstances, but there has to be freely and intelligent
9 consent given. So I can't see --

10 THE COURT: So, let me interrupt you again.

11 MR. DAKE: Yes, Your Honor.

12 THE COURT: All right. You talked about whether
13 the consent was voluntary, that it's not coerced or
14 involuntary.

15 MR. DAKE: Yes, Your Honor.

16 THE COURT: But I think we have to have a consent,
17 first, then I -- then I look at the record, the second step
18 would be to look at the record and say, well, okay, she said
19 yes, but would that be voluntary if there were 20 guns in her
20 face, and overwhelming force, and whatever the circumstances?

21 And that we've got a factual record now there were a
22 couple of agents at the house, the -- Mr. Zahaczewsky had his
23 gun drawn, pointed downward, Mr. Bryce had his taser in the
24 same position, other agents were there, is -- does that
25 constitute sufficient coercion to overcome what looks like a

1 pretty clear consent?

2 MR. DAKE: No.

3 THE COURT: Why?

4 MR. DAKE: It does not, Your Honor. Well, I think
5 there is a couple of points that need to be addressed. I
6 think that it's important -- it's not that this was a whole
7 slew of officers, this wasn't like a large SWAT operation
8 where they were busting into the house.

9 They were welcomed into the house, they opened the
10 door --

11 THE COURT: Well, let's -- "welcomed" is kind of a
12 loaded term. That would mean that there was -- you know,
13 that you're welcome, thank you, come in, please, glad to have
14 you here, as opposed to, okay, I'm not going to throw a fit
15 here. Let's just use that the officers were allowed into the
16 house. There are six -- there are eight of them on the
17 scene.

18 MR. DAKE: No, Your Honor. And that's why we
19 developed the record in the way that -- it wasn't eight on
20 the scene, Your Honor.

21 THE COURT: Well, I'm talking about "the scene"
22 being two in the back, in the car, I'm sure securing the back
23 of the house, two in the front, and then Mr. Bryce and Mr.
24 Zahaczewsky doing the heavy lifting with the child, knocking
25 on the door, and then Mr. Connelly and -- who was the fourth?

1 Mr. Salois?

2 MR. DAKE: I believe so, yes, Your Honor.

3 THE COURT: Okay. So, those four were in the
4 house, and then -- I think we had six in the house, finally,
5 didn't we?

6 MR. DAKE: No, Your Honor.

7 THE COURT: Four at the door?

8 MR. DAKE: The fourth one came later. It was the
9 three who entered into the house, originally.

10 THE COURT: Okay. So, then --

11 MR. DAKE: And then the fourth one came later into
12 the house, Your Honor.

13 THE COURT: Three officers at the door with guns,
14 and you've got a car in front with two officers in it. And
15 this neighborhood, this is East Glacier, I suspect you don't
16 routinely have police officers parked in front of your
17 house.

18 MR. DAKE: I wouldn't think so. Although, I
19 believe Special Agent Zahaczewsky said that there was an
20 unmarked police vehicle.

21 THE COURT: Right. I don't know if you're more
22 nervous seeing an unmarked car with two men sitting inside of
23 it versus a police car that might give you some feeling of
24 security.

25 MR. DAKE: I'm not sure that you'd realized it was

1 an officer's car.

2 THE COURT: Well, I think it was -- the presence of
3 the officers might make me feel better than two unknown men
4 sitting in an unmarked car in front of my house.

5 MR. DAKE: Yes, Your Honor.

6 THE COURT: That's when I call the Marshals
7 Service.

8 MR. DAKE: Yes, Your Honor.

9 THE COURT: All right. Well, so, why wouldn't Ms.
10 Little Dog's hospitality be forced? This was -- you know,
11 she had no choice. What was she going to do?

12 MR. DAKE: I wouldn't classify it as hospitality,
13 quite frankly, Your Honor.

14 THE COURT: I was using that in light of your
15 welcoming them into the house.

16 MR. DAKE: Thank you, Your Honor. I had a feeling.
17 I believe that when they sat down, the testimony from Deputy
18 Bryce was that she wasn't nervous. She didn't appear
19 nervous. And even on redirect, it was the same question,
20 these agents had guns that were out and they were searching
21 her house, she wasn't nervous about --

22 THE COURT: Well, let's go back to the first
23 entry.

24 MR. DAKE: Yes, Your Honor.

25 THE COURT: I mean, once the agents are doing the

1 search of the rooms, you know, doing their formations, they
2 are already searching by then. I think the two critical
3 points are allowing the officers beyond the threshold, and
4 then Mr. Bryce sits down with Ms. Little Dog, explains their
5 presence, and she says he's not here, go ahead and search.

6 You would agree that Ms. Little Dog could have stood in
7 the door and said don't you dare step foot in my house?

8 MR. DAKE: Absolutely, she could have.

9 THE COURT: All right. Now, that would have been a
10 clear objection to their presence.

11 MR. DAKE: Yes, Your Honor.

12 THE COURT: All right. Now, we have a somewhat
13 ambiguous acquiescence. She opens the door inward. I
14 believe Mr. Bryce -- or Mr. Bryce testified that he stepped
15 into the house as she stepped back to open the door.

16 MR. DAKE: Yes, Your Honor.

17 THE COURT: They are in. That she didn't say get
18 out of here.

19 MR. DAKE: No, Your Honor.

20 THE COURT: All right. But they are in. Are they
21 invited in at that point?

22 MR. DAKE: I believe that she was having the
23 conversation, as Deputy Bryce talked about --

24 THE COURT: So, we are in the gray area there, I
25 think. I mean, the critical -- so, the officers are in.

1 They are not really invited in yet, and she hasn't objected
2 to their presence. Mr. Bryce explains the reason for their
3 being there.

4 MR. DAKE: And I think that's why Special Agent
5 Zahaczewsky testified that he stood in the hallway area and
6 didn't move. He didn't begin the search at that point. He
7 waited until Deputy Bryce had spoken with Ms. Little Dog and
8 they had a conversation until what he believed --

9 THE COURT: So, now, instead of three armed men at
10 the door, we have three armed men in your house. Is that
11 more coercive?

12 MR. DAKE: Well, I mean, at that point, as Deputy
13 Bryce testified, that he put his taser away when he was
14 entering into the living room and sitting down with her.
15 Agent -- Special Agent Zahaczewsky still had his gun out, and
16 Officer Connelly also had his gun out. And I believe that
17 the testimony was that the other officer had not arrived at
18 that point.

19 THE COURT: Okay. All right. Well, let's finish
20 up on the first search. Anything else regarding any alleged
21 coercion on the first search?

22 MR. DAKE: Your Honor, I think that you consider
23 the totality of what Ms. Little Dog was having with her
24 interaction with Deputy Bryce and what he described to the
25 Court as very cooperative. And, in fact, somewhat out of

1 character for Ms. Little Dog.

2 And it's -- it doesn't suggest an individual who is
3 being coerced into allowing consent of her home. Or nothing
4 in the record, quite frankly, Your Honor, that she ever asked
5 him to stop.

6 And as she -- as Special Agent Zahaczewsky testified to,
7 she has had interaction with law enforcement before. During
8 her interview, she said that she had interactions with the
9 FBI before. So, these --

10 THE COURT: Well, Mr. Dake, I can sit up here and
11 be outspoken and aggressive in questioning, tough on people
12 in my courtroom, and that's the interaction that the public
13 has with me, or even the officers here; if those same
14 officers showed up at my house with guns drawn, I might be
15 very cooperative with them, because they have got their guns
16 drawn.

17 Would that -- how -- and Ms. Little Dog, I guess,
18 wouldn't be unique, as a politician, to be forceful, brash in
19 speaking out in her -- tougher in the public persona versus
20 how you react as a human when people show up at your house
21 with their guns drawn.

22 MR. DAKE: Absolutely, Your Honor. But I think
23 that there is distinctions. It's not that she is the same
24 person in one spot or the other, but it is showing that she
25 has a knowledge of what law enforcement is and has the

1 ability to understand that maybe these individuals, I can
2 tell them no, and that she has had those sort of interactions
3 before.

4 So, I believe that that's why it's important in the
5 record to see that she has had that interaction with law
6 enforcement in the past. And --

7 THE COURT: So, how do I evaluate it? Is it an
8 objective standard that --

9 MR. DAKE: Absolutely, Your Honor.

10 THE COURT: -- if Ms. Little Dog didn't have that
11 experience, she was a private person, a shut-in in her house,
12 had little contact with police or the public, would she be
13 held to a different standard in evaluating her consent versus
14 Ms. Little Dog?

15 MR. DAKE: Well, I think what we are evaluating in
16 this instance, Your Honor, is the possibility of coercion. I
17 think an individual who says, "Yes, you can search," it
18 doesn't matter the background of the person. If they say,
19 "Yes, you can search," you can search. That's the consent.

20 But I think where this is important is in the coercion
21 aspect of it, or whether or not she was coerced. And I think
22 that that is where that fact comes into play, to show that
23 she has had that interaction with law enforcement before, and
24 she --

25 THE COURT: Okay.

1 MR. DAKE: So, it supports that she was not coerced
2 into giving consent.

3 THE COURT: All right. Well, let's turn to
4 exigency.

5 MR. DAKE: Yes, Your Honor.

6 THE COURT: All right. What's -- what evidence in
7 the record do you believe supports the finding that exigent
8 circumstances justified this warrantless search?

9 MR. DAKE: I think both prior to and during the
10 search, exigent circumstances were present. So, prior to,
11 they began to see the defendant's background. As you heard
12 the testimony regarding his criminal history, --

13 THE COURT: Hold on. The defendant is Ms. Little
14 Dog here. You are talking about Mr. Gallardo, so let's be
15 clear for the record.

16 MR. DAKE: Yes, Your Honor.

17 THE COURT: You said, "The defendant's background."

18 MR. DAKE: I'm sorry, Your Honor. Thank you very
19 much. Thank you for that clarification. Yes, they reviewed
20 Mr. Gallardo's background. Not the defendant's background.
21 They reviewed his background, because that's the individual
22 that they were searching for. Saw that he had had various
23 criminal history --

24 THE COURT: Well, I don't mean to beat that point
25 for a moment, but this is an important point. If we are

1 | searching Mr. Gallardo's house, and he's the one subject to
2 | the arrest warrants and he gives consent, that's a whole
3 | different analysis. This is a third party, no criminal
4 | history, as far as I know, no contact with law enforcement.
5 | And if we are going to have agents going to her house to
6 | conduct a warrantless search, I think we've got to be very
7 | careful and make sure that we are following all of the
8 | constitutional requirements.

9 | MR. DAKE: I agree, Your Honor. I simply misspoke
10 | at who I called the defendant.

11 | THE COURT: I know you did. But I just wanted to
12 | clarify the -- or use that opportunity to emphasize the
13 | point. This is a search on a third party's house. The
14 | standard is pretty high here.

15 | MR. DAKE: I agree, Your Honor. And that's exactly
16 | why we framed the issue as we did in our reply brief, was
17 | simply that this is the issue, in a third-party search, in a
18 | search of a third party's residence with only an arrest
19 | warrant, it has to be with either consent or exigent
20 | circumstances.

21 | THE COURT: All right. So, I interrupted you. Go
22 | back to the exigency that you think was present.

23 | MR. DAKE: And, so, Mr. Gallardo's background, as
24 | the Court was aware, and as explained to the Court.

25 | There is also, then, the pending charges that were

1 | against Mr. Gallardo for abusive sexual contact with a minor.

2 | There is the FBI's statement.

3 | THE COURT: You would agree that the evaluation of
4 | those exigencies, it's what the officers knew at the time.

5 | MR. DAKE: It is, yes, sir.

6 | THE COURT: They don't got to come in and say,
7 | well, gee, after I executed the search, we really researched
8 | this guy and found out all of these horrible things he had
9 | been doing. It has to be what they knew at the time.

10 | MR. DAKE: Absolutely.

11 | THE COURT: And that's limited to Exhibit Number 1,
12 | the wanted poster. It's limited to Exhibit Number 2, the
13 | NCIC record. And Mr. Zahaczewsky testified that he had
14 | conversations with an Agent Bennett, I believe, in South
15 | Dakota?

16 | MR. DAKE: Yes, Your Honor.

17 | THE COURT: And Agent Bennett informed him of the
18 | high-speed chase and the possibility of the firearm by Mr.
19 | Gallardo.

20 | MR. DAKE: Yes. Within the last month, yes, Your
21 | Honor.

22 | THE COURT: All right. Those three things.
23 | Anything else?

24 | MR. DAKE: That was the previous. That was what
25 | they knew prior to going into this.

1 THE COURT: All right. Prior to the search. When
2 they pull up to the house, that's what they know.

3 MR. DAKE: Yes.

4 THE COURT: All right.

5 MR. DAKE: That is exactly right.

6 THE COURT: All right. Do any other exigencies
7 develop before they went into the house?

8 MR. DAKE: Before they went into the house?

9 THE COURT: Yes.

10 MR. DAKE: Yes.

11 THE COURT: What?

12 MR. DAKE: When the child was out front who
13 identified Mr. Gallardo being there. At that point, officers
14 knew that there was a child in the residence or near the
15 residence, they have an individual who was wanted on a sex
16 crime against a child. So, at that point, exigency comes
17 into play, again. Because if that child -- or if he has
18 access to that child, that's a very dangerous situation.

19 THE COURT: Okay. So, those four things. Anything
20 else?

21 MR. DAKE: I think it's also important to
22 recognize, as Deputy Bryce stated in his testimony, Ms.
23 Little Dog is in a wheelchair. And, so, if an individual
24 were inside of her house and, perhaps, making her a hostage,
25 or hadn't made her a hostage at that point but had the

1 ability to, Ms. Little Dog may be limited in resources in
2 order to protect herself.

3 THE COURT: Okay. That's the first search.

4 MR. DAKE: Yes, Your Honor.

5 THE COURT: Because officers don't know, when they
6 are knocking, pounding on the door and Ms. Little Dog is not
7 answering, maybe Mr. Gallardo is threatening her or doing
8 something and telling her not to answer the door.

9 MR. DAKE: Yes, Your Honor.

10 THE COURT: That's your point.

11 MR. DAKE: Yes, Your Honor.

12 THE COURT: Okay. Now, agents go in. They search
13 the house, top to not quite the bottom, and they don't find
14 him.

15 MR. DAKE: Yes, Your Honor.

16 THE COURT: And they leave. Okay? So, now,
17 let's -- I think that their departure restarts the
18 analysis.

19 MR. DAKE: I think to an extent, Your Honor, only
20 in the one -- and the reason that I say this is because his
21 criminal history doesn't go away, but he's --

22 THE COURT: Oh, no, I agree. But now we've got to
23 look at the second search.

24 MR. DAKE: We do, yes, sir.

25 THE COURT: I want to read you an excerpt from a

1 case. This is United States versus Jones, it's 286 F.3d
2 1146, it's a Ninth Circuit opinion. And, in that case, it
3 was do you have a consented search, whether it was voluntary.
4 And there was a prior -- you know, in that case, there was a
5 first entry that was deemed illegal, of whether the person
6 gave consent to the search.

7 MR. DAKE: Yes, Your Honor.

8 THE COURT: All right. So, the Court of Appeals
9 was trying to decide whether that consent could be valid
10 because you've got this first one. And the Court says, and
11 I'll quote here, "We have held that an illegal entry can
12 taint subsequent consent if the 'illegality is so connected
13 to the subsequent consent so as to render the consent
14 ineffective.'"

15 So, that isn't what we have here. That's where the
16 officers kick in the door the first time, they search the
17 place, can't find it, leave, and come back and say, "Oh, by
18 the way, we believe we've missed something, can we please
19 come in?" And the person says, "Well, okay." And that's not
20 what we have here. I understand that. I'm not suggesting
21 that.

22 Then the next part I want to talk about is the court
23 goes on to say, "In such a case, a person might reasonably
24 think that refusing to consent to a search of his home, when
25 he knows that the police have, in fact, already conducted a

1 search of the home, would be a bit like closing the barn door
2 after the horse is out."

3 MR. DAKE: Yes, Your Honor.

4 THE COURT: What's your reaction? I mean, here,
5 we've got -- in this context, we've got, arguably, a consent
6 to the first search different than what we have here. But
7 then we come back for a second search, and is Ms. Little Dog
8 thinking to herself, well, I've already consented once, can I
9 say no?

10 MR. DAKE: Well, I think we are back to the consent
11 aspect and away from the exigency for the moment, then, Your
12 Honor.

13 THE COURT: Okay. Well, tell me what you say --
14 that gets us back to the transcript review that we are going
15 to do.

16 MR. DAKE: Yes, Your Honor.

17 THE COURT: And then that's a question that I can
18 resolve. What exigent circumstances existed for the second
19 search?

20 MR. DAKE: I think it's the same exigent
21 circumstances.

22 THE COURT: Okay. So, let's go -- Exhibit Number
23 1.

24 MR. DAKE: Yes, Your Honor.

25 THE COURT: The wanted poster.

1 MR. DAKE: Yes, Your Honor.

2 THE COURT: Armed and dangerous, sex crime.

3 Exhibit Number 2, Mr. Gallardo's NCIC record.

4 MR. DAKE: Yes, Your Honor.

5 THE COURT: Several assault-type behaviors. The
6 third thing was the conversation Mr. Zahaczewsky had with
7 Agent Bennett in South Dakota, and the high-speed chase and
8 the possibility of a firearm.

9 The fourth thing, we still have the child there.

10 MR. DAKE: Yes, Your Honor. All of those, yes.

11 THE COURT: Okay. What about the idea of Mr.
12 Gallardo holding Ms. Little Dog hostage or threatening her?
13 Has that now evaporated? They've already been -- they have
14 searched the house, no one's holding any weapons to her
15 telling her to be quiet or anything like that.

16 MR. DAKE: I don't think it's evaporated, Your
17 Honor, but I think it still, obviously, would be a
18 consideration. But then as soon as they knocked on the door
19 and she answered the door, that would, then, have gone away.
20 That exigency component of her being a hostage at that point
21 would go away.

22 However, it would still exist had they determined at
23 that point and she had said, well, no, you are not going to
24 search and you've got to get out of here. Then, I think that
25 that comes back into play. Because had she made law

1 enforcement leave at that point to go get a warrant, now she
2 is back susceptible to an individual who is in her house.

3 So, I believe that it turned off for the moment when she
4 answered the door and showed that she was fine; but, at the
5 same point, had she said no, and they would have left the
6 house, then that exigency goes back up again.

7 THE COURT: Well, you have to -- that exigency
8 would go back if you're suggesting that Mr. Gallardo was
9 standing somewhere else in the house and telling Ms. Little
10 Dog, "Don't let them in, don't let them in."

11 MR. DAKE: Well, not necessarily, Your Honor. She
12 could have answered the door in the exact same way. I think
13 we are speaking in hypotheticals here, and so I'll address
14 them as a hypothetical, where she answers the door, allows
15 them to come in --

16 THE COURT: Unlike Mr. Bryce, you have to answer
17 hypothetically.

18 MR. DAKE: I do, yes, Your Honor.

19 THE COURT: I'm posing it to you, I am going to
20 make you answer it.

21 MR. DAKE: I do. She opens the door, and she
22 allows the officers to come in, and then she says, no, I
23 don't want you staying here, you're not going to search
24 again, go get a search warrant and I'll see you later. And,
25 so, they are going to have to leave at that point.

1 At that point let's say Mr. Gallardo comes upstairs from
2 the crawlspace, and he says, "Who was that?" And she says,
3 "It's law enforcement, they are going to go a get warrant,"
4 now she could be in a position where he becomes -- puts her
5 in a hostage situation or he says -- quite frankly, Your
6 Honor -- or where he says to her, "You know what? No, they
7 are not going to come back here, and now you're my hostage.
8 Now I've got a gun to you and" --

9 THE COURT: Presumably, at that point, if he had
10 any brains he would have left.

11 MR. DAKE: Say what, Your Honor?

12 THE COURT: Presumably, in your hypothetical, if he
13 had any brains he would have left at that point, if she said
14 they are getting a warrant.

15 MR. DAKE: Well, he may not have had a -- I mean,
16 we are getting, maybe, far afield.

17 THE COURT: My offenders are a little more
18 intelligent than yours, but --

19 MR. DAKE: I'll note that. Thank you, Your
20 Honor.

21 THE COURT: Okay. So, that's -- those are the
22 indicia of exigency for the second search.

23 MR. DAKE: Yes, Your Honor.

24 THE COURT: Okay. All right. I just wanted to
25 flesh out all of those factors. All right. Anything else

1 about either search?

2 Oh, one more question that I have.

3 MR. DAKE: Yes, Your Honor.

4 THE COURT: What do I do with Mr. Bryce's statement
5 somewhere along the lines of, Cheryl, open up or I'm going to
6 kick in the door? I think that's the sanitized version.

7 MR. DAKE: Yes, I think that's exactly how he
8 stated it. Before the first search, you mean, Your Honor,
9 correct?

10 THE COURT: Yes. So, I guess, how does that weigh
11 into the coercion analysis?

12 MR. DAKE: And I think that Ms. Cross Guns will
13 argue that it does factor heavily into a coercion, in that
14 law enforcement knocks on the door and then says that they
15 are going to kick it in. I think it's important not to
16 overlook that they had already knocked three times,
17 identified themselves, and said this is -- this is law
18 enforcement, let us in.

19 This is not a situation where the door was kicked in,
20 which is typically where coercion is seen, where law
21 enforcement comes to a house, kicks in the door, and then
22 asks, hey, can we search your apartment or you house, and
23 then they consent. That's where the coercion is.

24 All that he said was a fact, quite frankly, Your Honor,
25 which was we are knocking on the door, if you don't respond

1 I'm going to kick it in.

2 THE COURT: Okay. So, back to my case, this Jones
3 case, there was an illegal re-entry.

4 MR. DAKE: Was that -- I believe that was an
5 apartment case, Your Honor?

6 THE COURT: Well, I -- I don't have it committed to
7 memory yet, but --

8 MR. DAKE: I can --

9 THE COURT: I'm trying to remember. Let me just
10 give you the broad outlines. There was an illegal entry.
11 The officers left, then they came back and said, "Oh, can we
12 come in and search?" And the occupant said, "Okay," thinking
13 to themselves, well, they have already searched, what am I
14 going to do?

15 So, my question for you is if I were to determine --
16 this is a hypothetical. If I were to determine that, in the
17 first search, the consent was coerced, what does that do with
18 respect to the second search? Does that taint the second
19 search? Even if the person consented?

20 Now, this is the barn -- the horse is already out of the
21 barn argument.

22 MR. DAKE: Yes, Your Honor.

23 THE COURT: Okay.

24 MR. DAKE: I think -- oh, did you want me to
25 answer, Your Honor, or do --

1 THE COURT: Oh, was that your -- I thought that was
2 your answer.

3 MR. DAKE: No, that wasn't my answer.

4 THE COURT: Oh, okay.

5 MR. DAKE: No, Your Honor. I didn't know if that
6 was -- if that was the question.

7 THE COURT: I was going to applaud you for your
8 candor, but --

9 MR. DAKE: (Smiling)

10 MS. CROSS GUNS: I thought it was an answer.

11 THE COURT: Go ahead, Mr. Dake.

12 MR. DAKE: No. No, Your Honor, that wasn't my
13 answer. I was trying to make sure I understood what you were
14 asking.

15 THE COURT: Okay.

16 MR. DAKE: As the Court is aware, there are two
17 separate searches; and what had happened during the first
18 search and what happens during the second search are not the
19 same thing. She --

20 THE COURT: You don't think that a coercive consent
21 in the first search could invalidate a -- or invalidate a
22 consent in the second case?

23 MR. DAKE: I think that we would look at the two
24 searches separately, Your Honor.

25 THE COURT: Really?

1 MR. DAKE: Yes, Your Honor.

2 THE COURT: All right. So, we would have to have a
3 separate consent for each search.

4 MR. DAKE: And I think that's exactly what the
5 Court has stated. So, I think that it's -- it only -- the
6 logic makes sense that if we are looking for the consent in
7 both searches, we treat them as separate searches.

8 THE COURT: Okay. One other Ninth Circuit case I'm
9 going to discuss is United States versus S-H-I-V-U, Shivu,
10 1990, 920 F.2d 1423. And the quote is, "Consent to a
11 warrantless search cannot be inferred from a failure to
12 object to officers' entry, where officers did not expressly
13 or impliedly request permission and where a defendant did not
14 expressly grant or refuse entry."

15 So, there is some concern here on that second search.
16 And I'll have to look at the transcript, but I'm just telling
17 you that for your purposes.

18 MR. DAKE: And I don't disagree with that at all,
19 Your Honor, I just can't -- cannot recall what Deputy Bryce
20 testified to.

21 THE COURT: Okay.

22 MR. DAKE: As far as the second search. The only
23 other point that I would make, Your Honor, is, quite frankly,
24 the inevitable discovery argument, and --

25 THE COURT: Well, how does that factor in? I mean,

1 that seems like it's almost too convenient, just, well, you
2 know, we would have found him, anyway. You know, we got a
3 warrant, whatever, they didn't.

4 MR. DAKE: Well, the -- absolutely. But the
5 inevitable discovery argument, Your Honor, comes up in this
6 sort of a situation.

7 THE COURT: Well, let me tell you why I'm concerned
8 about inevitable discovery.

9 MR. DAKE: Yes, Your Honor.

10 THE COURT: Up until the officers entered Ms.
11 Little Dog's house, and up until the point where Mr. Bryce
12 began to question her, I haven't seen anything to indicate
13 that Ms. Little Dog had committed any crime and that there is
14 a knowledge requirement of harboring a fugitive. So, unless
15 the government has evidence that Ms. Little Dog had knowledge
16 of Mr. Gallardo's status as a fugitive before being informed
17 of that fact by Mr. Bryce, I don't know if she had committed
18 a crime.

19 So, the two crimes in the Indictment charge harboring a
20 fugitive; and from what I can glean from the Indictment, the
21 harboring a fugitive, the elements were satisfied once Ms.
22 Little Dog claimed that Mr. Gallardo was not there and
23 Mr. Bryce informed her that he was a fugitive. And, so, that
24 took place after the officers got in the house.

25 Then the false statement charge, which happens, again,

1 she makes that false statement after the officers have
2 entered her house. That's what really concerns me. I mean,
3 I'm not a big fan of those false statement charges, when the
4 statement is in the course of the investigation. As you
5 know, that statute was passed because people were submitting
6 false claims during the Civil War, and it's the same thing
7 that happened during the New Deal, you know, the government
8 is passing out money, let's make false claims, you've reached
9 that Exculpatory-No Doctrine.

10 So, these are pretty serious charges that take place
11 after the -- as a result of the officers entering into the
12 house. If she had said, "No, don't come in," I'm not sure
13 she -- you could have gotten an Indictment.

14 MR. DAKE: Well, and I think it's important, first
15 of all, Your Honor, that we didn't present all of the
16 evidence that we had about the officers' knowledge, today.

17 THE COURT: You did or didn't? I'm sorry?

18 MR. DAKE: We did not.

19 THE COURT: Okay.

20 MR. DAKE: As to Ms. Little Dog's knowledge.
21 Because, quite frankly, that's not the purpose of this
22 hearing. But officers had more knowledge about what she knew
23 about Mr. Gallardo, and when she knew about his criminal
24 status, prior to going to her home that day. So, I believe
25 that that, combined with what they encountered at the home,

1 | what their information was would have gotten them probable
2 | cause to get a warrant.

3 | THE COURT: Give me another example where the
4 | inevitable discovery doctrine applies.

5 | MR. DAKE: Where, I'm sorry, what, Your Honor?

6 | THE COURT: Where the inevitable discovery doctrine
7 | would apply.

8 | MR. DAKE: In which sort of a context, Your Honor?

9 | THE COURT: Anything. Give me a context.

10 | MR. DAKE: I think the context is simply as we see
11 | typically see it, which is officers go in with exigent
12 | circumstances and search a house, and the court later
13 | determines that, no, that's not enough for exigent
14 | circumstances. But when you looked at it in the first place,
15 | they knew that the person who had shot the guy at the car
16 | dealership had ran into the house, and was inside the house
17 | with the gun.

18 | That would be probable cause for them to get inside the
19 | house, but might not be exigent circumstances. And, so, in
20 | that case, had they gone in, searched the house, gotten the
21 | gun, I think that the court could still find, no, you didn't
22 | have exigency, get a warrant, you should have gotten a
23 | warrant. And then there was inevitable discovery, which is,
24 | yeah, had we gotten a warrant we would have found that gun
25 | inside the place that he had run into.

1 THE COURT: For inevitable discovery to apply, must
2 the officers had established probable cause before they went
3 into the house?

4 MR. DAKE: Can you rephrase your question?

5 THE COURT: I didn't phrase that very well. Okay.
6 We have the inevitable discovery doctrine.

7 MR. DAKE: Yes, Your Honor.

8 THE COURT: And the example that you gave was that
9 somebody went into a house. And the officers went in
10 thinking they had exigent circumstances, the court says, no,
11 they didn't. But they would have inevitably discovered the
12 evidence, because they could have gotten a warrant based upon
13 probable cause.

14 MR. DAKE: Yes, Your Honor.

15 THE COURT: All right. So, my question is in order
16 for inevitable discovery to apply, would it have to be a
17 situation in which the officers could have gotten a warrant
18 based upon probable cause?

19 MR. DAKE: I think it has to be, yes, Your Honor.

20 THE COURT: All right.

21 MR. DAKE: That that's --

22 THE COURT: All right. But I thought you admitted
23 earlier at the time of the first search the officers had not
24 yet established probable cause.

25 MR. DAKE: At the time of the first search?

1 THE COURT: Yeah.

2 MR. DAKE: I believe that they wouldn't have. But
3 inevitable discovery comes in. We are treating the two
4 searches separately. So, inevitable discovery would have
5 come in in the second search.

6 THE COURT: How?

7 MR. DAKE: Because --

8 THE COURT: Where was probable cause established by
9 the first search? They didn't find anything.

10 MR. DAKE: They did not find anything, Your Honor.
11 But, I think, combined with what they believed in the
12 house -- what they believe the last area was that they hadn't
13 checked in the house, they had not talked to that child yet
14 who was in front of the house who said, yeah, that guy is
15 inside of the house. So, that would have gone to their
16 probable cause that they didn't have when they entered the
17 house the first time.

18 THE COURT: Okay. All right. Anything else you
19 want to add?

20 MR. DAKE: (Viewing documents) No, thank you, Your
21 Honor.

22 THE COURT: All right. Thank you, Mr. Dake.

23 MR. DAKE: Thank you, Your Honor.

24 THE COURT: Ms. Cross Guns.

25 MS. CROSS GUNS: Thank you, Your Honor. This is an

1 interesting scenario.

2 THE COURT: Do you agree that -- you heard
3 Mr. Bryce testify about what Ms. Little Dog said about the
4 first search?

5 MS. CROSS GUNS: Yes.

6 THE COURT: That, "He's not here. Go ahead and
7 look." You heard that?

8 MS. CROSS GUNS: I heard it.

9 THE COURT: All right. You didn't -- it's
10 unrefuted.

11 MS. CROSS GUNS: It's unrefuted. (Indicating)

12 THE COURT: Okay. That's what he claims she said.
13 So, with the first search, are we looking, then, solely at
14 coercion?

15 MS. CROSS GUNS: Yes.

16 THE COURT: You agree that she said he's not here,
17 go ahead and search. There is no -- nothing for me to
18 believe that didn't happen.

19 MS. CROSS GUNS: There is nothing to believe that
20 didn't happen. But he also testified that he said -- first,
21 he said that -- Agent Mark, because I can't say his last
22 name --

23 THE COURT: Zahaczewsky.

24 MS. CROSS GUNS: Zahaczewsky.

25 THE COURT: Yeah.

1 MS. CROSS GUNS: He --

2 THE COURT: It's Polish.

3 MS. CROSS GUNS: -- knocked lightly. That was
4 Bryce's testimony, that he didn't knock very loudly. And
5 then Deputy Bryce banged hard. He says, himself, banged
6 hard, and he said, "If you don't open the door, I'm going to
7 kick it in."

8 Now, is a person required to open the door to these
9 guys? Are they required to open the door to see what they
10 want? I don't know. (Shakes head negatively) They didn't
11 say, "We have a warrant to search your house," because they
12 didn't have a warrant to search her house. But they offered
13 to kick the door in.

14 And then when she opens the door, Detective -- or Deputy
15 Bryce testifies that he's got his taser right here
16 (indicating), and Zahaczewsky is right behind him with a
17 weapon, a gun right here (indicating), and another officer
18 behind him with a gun (indicating). Come in.

19 And I think that's one of the --

20 THE COURT: All right. So, three officers are in
21 the house.

22 MS. CROSS GUNS: Yep. With guns.

23 THE COURT: Mr. Bryce testified that he knelt down
24 next to Ms. Little Dog, explained the reason for their being
25 there, explained Mr. Gallardo's criminal history.

1 MS. CROSS GUNS: Sure.

2 THE COURT: Explained Mr. Gallardo's outstanding
3 warrant.

4 MS. CROSS GUNS: (Nods head affirmatively)

5 THE COURT: And asked if he were there. Mr. Bryce
6 testified that Ms. Little Dog said, "He was here."

7 MS. CROSS GUNS: (Nods head affirmatively)

8 THE COURT: So, this isn't something out of left
9 field.

10 MS. CROSS GUNS: Right.

11 THE COURT: "He was here, but he left. He left
12 Wednesday."

13 MS. CROSS GUNS: Correct.

14 THE COURT: He's not here, go ahead and search.

15 MS. CROSS GUNS: Correct.

16 THE COURT: All right. So, why is that coercive?

17 MS. CROSS GUNS: Well, he didn't kneel down, he sat
18 down next to her.

19 THE COURT: All right.

20 MS. CROSS GUNS: And he stayed there with her while
21 the rest of the officers are going through her house
22 searching.

23 THE COURT: Well, the testimony --

24 MS. CROSS GUNS: That's --

25 THE COURT: The testimony was that Mr. Zahaczewsky

1 waited in the hall --

2 MS. CROSS GUNS: Uh-huh.

3 THE COURT: -- until he heard Ms. Little Dog say
4 he's not here, go ahead and search.

5 MS. CROSS GUNS: I understand.

6 THE COURT: So --

7 MS. CROSS GUNS: With his weapon drawn. And I
8 think that's one of the --

9 THE COURT: But they are not ransacking the house,
10 they are standing there waiting.

11 MS. CROSS GUNS: I -- that's correct.

12 THE COURT: So, where is the coercion?

13 MS. CROSS GUNS: They talk about -- the government
14 talks in their own brief about voluntariness, and it's got a
15 five-part test. And one of those tests is whether the
16 arresting officers -- or the searching officers, in this
17 case, had their guns drawn. Because that creates a great
18 deal of fear.

19 I'm not sure that I would have done anything
20 differently, and I am pretty knowledgeable about the law. If
21 you are going to kick my door in, and you are going to come
22 in with guns, Okay, go ahead and look. Go ahead and look
23 (indicating)." So --

24 THE COURT: Do you have any case law -- what case
25 would you point to that most supports your decision? Say,

1 look, here's an analogous set of facts, this case is on all
2 fours with Ms. Little Dog's situation.

3 MS. CROSS GUNS: And I don't know that we have an
4 all-fours, in every corner. I do --

5 THE COURT: Give me three.

6 MS. CROSS GUNS: (Laughing) Well, I think -- in my
7 opinion, all of the cases that I cited to, even starting with
8 Katz. And the question is reasonableness. If it's
9 unreasonable to believe that you're allowing the search
10 because somebody is threatening to kick your door in and they
11 come in with guns drawn, I think that's reasonableness.

12 THE COURT: Well, but don't I have to evaluate the
13 reasonableness in the context of the circumstances?

14 MS. CROSS GUNS: Yes.

15 THE COURT: We have got a fugitive wanted on a
16 serious felony charge involving the sexual abuse of children.
17 The officers are told by an agent in South Dakota that we had
18 a high-speed chase, the fugitive escaped, that he may have a
19 weapon. That's what they know going in.

20 MS. CROSS GUNS: Sure.

21 THE COURT: So, is it unreasonable for a force of
22 three or four officers, who show up at the door, to go and
23 start looking for that person?

24 MS. CROSS GUNS: I don't know if that's
25 unreasonable. What I do know is that, you know --

1 THE COURT: Well, that's -- if you don't know, how
2 do I know? Tell me what it is. If you don't think it's
3 unreasonable, then I won't.

4 MS. CROSS GUNS: Well, like I said, even looking at
5 the government's cases, they talk about what is reasonable.
6 Okay, they show up at the door, what if Cheryl hadn't opened
7 the door? And they kicked the door in, and came in, and they
8 found nothing? Just like they did, they found nothing.

9 THE COURT: Then Ms. Little Dog has a claim against
10 the government that they did damage to her property.

11 MS. CROSS GUNS: Yeah.

12 THE COURT: And, maybe, a claim against the
13 officers for a violation of her constitutional rights.

14 MS. CROSS GUNS: Right.

15 THE COURT: But that's not what happened.

16 MS. CROSS GUNS: No. But I do think they are still
17 in violation of her constitutional rights because they
18 offered to kick it in. Look, she is in a wheelchair. She
19 can't defend herself against somebody kicking her door in.
20 She can't defend herself against guns and tasers, so, yeah,
21 she is going to back up.

22 THE COURT: Well, Mr. Bryce and Mr. Zahaczewsky
23 both testified that we didn't know, you know, we didn't know
24 whether Mr. Gallardo was inside the door prohibiting her from
25 answering it, striking her if she answered it. We didn't

1 know. This was a fast-flowing situation. We are making
2 decisions on the go. Why should I second-guess that?

3 MS. CROSS GUNS: I think they were fast moving to
4 their own impetus. Not because there was something there.
5 Here is a little child that they say they question, then they
6 say --

7 THE COURT: Are you doubting that they questioned
8 him?

9 MS. CROSS GUNS: No, no. I'm not doubting that at
10 all. They say, "Is this guy in here?" Do they ever say,
11 "Does he have a gun?" "Is he holding anybody hostage?" Any
12 of those, sort of, more exigent questions, that we have an
13 emergency here, we have to kick the door in. The kid comes
14 out, they don't say he's upset and he's worried, or he's
15 frightened or he's running away, so I don't see that
16 connection there that says, oh, now we have to be afraid,
17 because there is a small child coming out of the house. I
18 don't see that escalation.

19 THE COURT: You wouldn't think that the presence of
20 an alleged sex offender in the home of a six-year-old child
21 would cause concern?

22 MS. CROSS GUNS: I think it should cause concern.
23 But I don't think it should cause people to be kicking down
24 the door when the kid is just leaving. If that -- if they
25 are concerned, why don't they take the kid and say, "Have you

1 | been molested by this guy? Is he trying to take" --

2 | THE COURT: Well, wait a second. Before we can --
3 | wouldn't it be more prudent to secure the fugitive first
4 | before we ask the kid those questions? I mean, --

5 | MS. CROSS GUNS: (Indicating) (Shakes head
6 | negatively)

7 | THE COURT: -- after we waste all of the resources
8 | and time interrogating a six-year-old and the fugitive runs
9 | out the back door.

10 | MS. CROSS GUNS: Well, they had plenty of officers.
11 | I don't think he would have run out the door. You know?

12 | THE COURT: Okay. So, that was one factor. But
13 | the child confirmed the presence of this -- of Mr. Gallardo
14 | in the house.

15 | MS. CROSS GUNS: Yes.

16 | THE COURT: So, the officers -- and they have a tip
17 | from an anonymous source.

18 | MS. CROSS GUNS: Yes.

19 | THE COURT: Now we've confirmed that he's in the
20 | house. And along with the other factors that they know,
21 | we've got Exhibit 1, the wanted poster; Exhibit 2, the
22 | criminal history; and the call with the agent in South
23 | Dakota. Now we've determined that the person in Exhibit 1
24 | and Exhibit 2 and the call from South Dakota is, in fact,
25 | here at the house. Doesn't that heighten the exigency?

1 MS. CROSS GUNS: I don't know that coming from a
2 small child, yeah, that's my grandma's boyfriend, he's in the
3 house, does that mean -- we don't have that exact language.

4 So, I don't know exactly what this boy said, he's been
5 in the house, he's in the house right now, they are having
6 breakfast, you know, I don't know what he said. And I don't
7 know if the child means, well, he's been here, or does he
8 mean here right now? I don't know.

9 THE COURT: Uh-huh.

10 MS. CROSS GUNS: And I don't know that we will ever
11 know for sure what happened there. I don't doubt that there
12 are reasons to be concerned; but I also don't doubt that if
13 they had that kind of exigency, then they should have some
14 probable cause to get a warrant to go into the house.

15 And as you stated, and we've all stated, warrantless
16 searches are presumptively illegal. And, okay, let's say
17 that they came in, they offered to kick the door down, they
18 got guns and all of that sort of thing, and they go through
19 and they find nothing, then they leave. And not an hour
20 later, as is alleged in the brief, but less than ten minutes
21 later they come back.

22 Now, I don't believe the so-called exigencies have left,
23 but they don't come in with guns drawn. So --

24 THE COURT: (Laughing) Well --

25 MS. CROSS GUNS: And maybe they don't have to,

1 | because they have already --

2 | THE COURT: Well, wait a second. I mean, the guns
3 | drawn goes to the coercive element, doesn't it?

4 | MS. CROSS GUNS: It does.

5 | THE COURT: The fact that the officers took a deep
6 | breath the second search and said, well, we are not quite as
7 | concerned. I'm not sure I can hold that against them in
8 | terms of coercion.

9 | MS. CROSS GUNS: Well, you don't have to have your
10 | guns drawn. It's sort of like -- it's sort of like domestic
11 | abuse, okay? So, she gets beat up enough times by the bad
12 | guy and all of this sort of thing to where he just has to
13 | look at her and she will say, okay, whatever you want.

14 | THE COURT: Okay. Well, let's talk about --

15 | MS. CROSS GUNS: And --

16 | THE COURT: -- that for a second. I mean, Ms.
17 | Little Dog is a person of prominence in her community.

18 | MS. CROSS GUNS: Uh-huh.

19 | THE COURT: How does that factor into my analysis?
20 | Would I look at an abused spouse differently in terms of a
21 | voluntary consent versus Ms. Little Dog, for whom Mr. Bryce
22 | testified holds her own in any situation?

23 | MS. CROSS GUNS: (Indicating) You know, to a
24 | certain extent there might be a difference. But I don't
25 | think when there are guns involved. I'm a pretty

1 strong-willed person, too; but if somebody comes to my house,
2 and they have guns drawn, even if they are not pointed at me
3 I'm going to have a different response than I might have
4 under other kinds of circumstances.

5 Like in here. I can argue with these guys, I can argue
6 with Logan. I can argue away and be, as you said, very
7 assertive and very brash and very obnoxious. But if somebody
8 has a gun, then I'm like, "Okay, yeah, come on in, look
9 around."

10 And then five minutes later they come back, and I do
11 think it's tainted at that point. I think, at that point,
12 you know -- I think it was tainted from the get-go. They
13 found nothing, they left, they came back five minutes later
14 and said we are going to look some more. They can't do that
15 if they have a warrant. They can't do it. (Shakes head
16 negatively) They shouldn't be allowed to do it here.

17 THE COURT: Is there anything that would prevent
18 Ms. Little Dog from consenting twice?

19 MS. CROSS GUNS: There is nothing, other than just
20 (nods head affirmatively) --

21 THE COURT: So, you think that -- I understand that
22 if they had a warrant, that they needed a warrant for a
23 second search, unless she consents again.

24 MS. CROSS GUNS: Yep.

25 THE COURT: So, the question for me is did Ms.

1 Little Dog voluntarily consent on the second search?

2 MS. CROSS GUNS: And I don't believe she did. And
3 I don't believe -- I don't believe they have the facts. And
4 I don't believe, given what happened in the first search,
5 that you can look at the second search the same way. They
6 didn't have to come in with guns drawn, they were only gone
7 for five minutes. And they come back, and everybody is
8 still, okay --

9 THE COURT: Well, what about the -- the first
10 search, I think, as Mr. Zahaczewsky, I believe, testified,
11 that he saw a man's cowboy boots there.

12 MS. CROSS GUNS: Uh-huh.

13 THE COURT: That there was -- I don't know if there
14 are other -- I'll have to look at the record, but other
15 testimony about the presence of a man at the house. Ms.
16 Little Dog testified -- or stated -- or told the officers
17 that Mr. Gallardo left, but, arguably, some of his belongings
18 might have been there, the cowboy boots could have been --
19 might still be here, why would he leave his stuff behind?

20 MS. CROSS GUNS: Right. There is only -- they are
21 only a pair of cowboy boots. Because I did ask him, "What
22 was there?" And if they have this, you know, pile of
23 clothing. But what they find is a bra, not a pair of shorts
24 or anything like that.

25 THE COURT: Okay.

1 MS. CROSS GUNS: So, a pair of boots. If he's got
2 more than one pair of shoes, and he's -- then he's jetting
3 out in the countryside or whatever he's doing, you know,
4 that's -- that, obviously, wasn't enough for them to continue
5 searching, the first search, to say what didn't we -- what
6 didn't we see? They could have stayed right in the house and
7 consulted each other and said, "What are we missing?" But
8 they didn't. They left.

9 THE COURT: Okay.

10 MS. CROSS GUNS: So, let's see. I would note,
11 also, that the guns that are drawn, they are not drawn in the
12 public setting of council meetings, they are not drawn in the
13 public setting of trainings and all of that. So, I do think
14 that we have a very different scenario. I do think -- I
15 think people would give consent under those circumstances,
16 even if they didn't want to give consent, or if they had
17 concerns about what was happening, you know, to their search
18 -- or to their home. Excuse me.

19 THE COURT: Ms. Cross Guns, back to the
20 reasonableness question.

21 MS. CROSS GUNS: Sure.

22 THE COURT: If the officers -- you know, four
23 officers show up with guns drawn investigating a traffic
24 ticket.

25 MS. CROSS GUNS: (Smiling)

1 THE COURT: That seems an unreasonable show of
2 force to me.

3 MS. CROSS GUNS: (Nods head affirmatively)

4 THE COURT: And designed to intimidate the
5 person.

6 MS. CROSS GUNS: Right.

7 THE COURT: But, here, don't I evaluate the
8 reasonableness in the context of the totality of the
9 circumstances, what the charges are, what the allegations are
10 against this person, and the danger to Ms. Little Dog, the
11 danger to the -- to her grandson, to other people in the
12 house and the community?

13 MS. CROSS GUNS: (Nods head affirmatively)

14 THE COURT: Isn't that the analysis I make?

15 MS. CROSS GUNS: Well --

16 THE COURT: I mean, that's one factor, right?

17 MS. CROSS GUNS: That's one factor.

18 THE COURT: Okay.

19 MS. CROSS GUNS: I agree. That's one factor.

20 THE COURT: Okay.

21 MS. CROSS GUNS: And, again, in their own briefs
22 they say, "Law enforcement is required to obtain a search
23 warrant for a third party's residence." And I think you've
24 asked appropriate questions with regard to this is a third
25 party. We are not looking at her criminal record, we are not

1 looking at exigent circumstances with regard to her. Other
2 than she might be held hostage. But if they are going to ask
3 the kid, "Is he in there," (indicating) maybe there should
4 have been another question before they offered to kick down
5 the door or come in with their guns ready (indicating) to
6 shoot somebody. Uhm, that didn't happen.

7 THE COURT: Okay.

8 MS. CROSS GUNS: And I think it tainted the second
9 one. They could have gone and got a warrant if they thought
10 they had some kind of probable cause to do that, but they
11 came back and said we are not done looking.

12 THE COURT: I'm not sure they could have gotten a
13 warrant the second time, because it would be, well, we
14 searched the house, didn't find anything, we may have missed
15 something.

16 MS. CROSS GUNS: Well, exactly. And that is a
17 problem. And it is a problem that bothers me. The smell
18 test sort of doesn't work for me on this particular set of
19 facts. Was the consent in the first search given freely? I
20 don't believe it was. Was it given intelligently? That's a
21 different question. Certainly, she is a political person,
22 knows about things like this. But freely? I don't think so.

23 I know that, you know, she and Logan know each other,
24 and know each other in a particular context, and I think that
25 may have led to some of that concern. I don't know. He --

1 she knows he knows what he is doing, and he's coming in, he's
2 going to kick my door down. I know it hinges somewhat on
3 what the officers believed. What did they reasonably believe
4 about her consent? Was she giving consent?

5 She said, yeah, come and look, the first go-round. The
6 second go-round, I don't have a crawlspace (indicating), he's
7 not here. Did she consent? Or was she like, oh, God, they
8 are back, and they still have guns. Because you can see
9 them, you know, even if they don't have them drawn. I just
10 think it doesn't pass the smell test.

11 And cooperation isn't part of that, so -- and letting
12 them through the door when they are offering to do harm to
13 the house and to the people in the house, I think, taints the
14 whole thing.

15 THE COURT: All right. Thank you, Ms. Cross
16 Guns.

17 MS. CROSS GUNS: Thank you.

18 THE COURT: I won't belabor the inevitable
19 discovery point, but -- you're finished, I assume, Mr. Dake?

20 MR. DAKE: I'm sorry, Your Honor?

21 THE COURT: You're finished, I assume?

22 MR. DAKE: I am, yes, Your Honor. Unless the Court
23 has something further.

24 THE COURT: No, no. I think we have developed a
25 record here. I think I understand what the issues are. I

1 think the witnesses that testified -- the record has been
2 developed here. You can sit down, Mr. Dake.

3 MR. DAKE: Thank you, Your Honor.

4 THE COURT: I was just going to comment on some
5 things. The inevitable discovery exception has some pretty
6 strict limits to it. And you can look at the case law,
7 yourself. So, I'm not going to belabor that point now as we
8 talked about it in terms of an order. The trial in this case
9 is in June, Mr. Dake? Is that right?

10 MR. DAKE: It is, yes, Your Honor.

11 THE COURT: June what?

12 MR. DAKE: 6th.

13 MS. CROSS GUNS: 6th.

14 THE COURT: Okay. I am going to take this case
15 under advisement. I -- it's a very close case. There is
16 some difficulties for both sides.

17 Mr. Dake, I'll have to look at the transcript about
18 consent -- about affirmative consent with regard to the
19 second search. I'm concerned about an inference of consent,
20 well, she didn't object, and she said there was no
21 crawlspace, does that translate to go ahead and look around
22 my house? I'm not sure that's the same thing. That's a
23 concern that you have. And I -- if I get past that, then the
24 inevitable discovery. But there is limits on the inevitable
25 discovery's application.

1 And then we can talk about exigency. So, I think there
2 were some exigent circumstances, certainly. But, again, we
3 are talking about a search of a third party's house, and I
4 think the charges in this case developed chiefly during that
5 search, the warrantless search of a third party's house. So,
6 I have some concerns about that.

7 So, the government -- this is a totality of the
8 circumstances analysis, so I'm going to look more carefully
9 at the Ninth Circuit case law. The -- and the transcript,
10 we'll get a copy of that and take a look at that. Because I
11 don't recall testimony about affirmative consent on the
12 second search.

13 So, there is some weakness in the government's case.

14 Ms. Cross Guns, you have some weaknesses in your case,
15 certainly.

16 MS. CROSS GUNS: Yes.

17 THE COURT: We've got -- and you know what I'm
18 talking about. Mr. Gallardo's status, and I won't belabor
19 the point, you know, we've got Exhibit 1 and Exhibit 2, the
20 call with the agents.

21 MS. CROSS GUNS: Uh-huh.

22 THE COURT: The identification by the grandson.
23 This is, again, totality of the circumstances. I've got to
24 evaluate consent --

25 MS. CROSS GUNS: (Nods head affirmatively)

1 THE COURT: -- in the context of the whole
2 circumstances. That includes Ms. Little Dog's position in
3 her community, her previous dealings with law enforcement,
4 her ability to stick up for herself. And then I also have to
5 evaluate exigent circumstances in those contexts.

6 So, I'm going to take it under advisement. It is a very
7 difficult, close case, and I urge the parties to consider a
8 resolution of it. But I'll have an order out, I would say --
9 today is the 28th? I'll have an order out by May 12th. And,
10 so, I can decide it by May 12, or you can figure it out for
11 yourselves.

12 All right. Anything further, Mr. Dake?

13 MR. DAKE: No, thank you, Your Honor.

14 THE COURT: Mr. Rostad, do you have anything to
15 add?

16 MR. ROSTAD: I don't, Your Honor. Thank you --

17 THE COURT: I'm sorry to hear that.

18 MR. ROSTAD: Thank you for your hospitality
19 today.

20 THE COURT: I understand that you are going to be
21 back a few times, though, before you leave permanently.

22 MR. ROSTAD: Pardon me?

23 THE COURT: I said that I understand that you will
24 be back a few times before you leave permanently.

25 MR. ROSTAD: I hope so, Judge. I hope so.

1 THE COURT: Have we figured out a time for our
2 change of plea in the other case?

3 MR. ROSTAD: I'm working on it. Unfortunately, I
4 didn't get a response from my opposing counsel.

5 THE COURT: All right. I have a --

6 MR. ROSTAD: But I will remind him.

7 THE COURT: I have a hole in my schedule that I
8 can't get out of, I'm afraid.

9 MR. ROSTAD: We will do our best to get an answer
10 tomorrow.

11 THE COURT: Okay. Thank you, Mr. Rostad. Nice to
12 see you.

13 Ms. Cross Guns, anything else?

14 MS. CROSS GUNS: Nothing. Thank you, Your Honor.

15 THE COURT: All right. So, we will have an order
16 out by May 12.

17 MR. DAKE: Thank you, Judge.

18 THE COURT: We will be in recess. Thank you.

19 (Proceedings concluded at 4:27 p.m.)
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CERTIFICATE

I, Julie L. Sampson, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter to the best of my knowledge, skill, and ability.

/s/ Julie L. Sampson
Julie L. Sampson

04/10/2017
Date